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FLORIDA'S LAKES: PROBLEMS IN A WATER PARADISE*

FRANK E. MALONEY and SHELDON J. PLAGER**

In an area in which lawmakers have not always equated water law with water facts¹ it is encouraging to discover that the lawyer and the hydrologist are essentially in accord on the basic physical characteristics that distinguish a natural lake² or pond from a natural watercourse. While lakes and watercourses are both bodies of water occupying a bed or depression in the earth's surface, the courts have contrasted the watercourse to the lake or pond on the basis that the water in a watercourse has a current or continuous motion, whereas in a lake or pond the water is substantially at rest.³ Although roughly accurate as a descriptive characterization, this statement is in fact somewhat of an oversimplification.

A lake is essentially a "closed" or self-contained system; its mode

*This is the third in a series of articles on Florida's water law. The first, *Florida's New Water Resources Law*, appeared in 10 U. FLA. L. REV. 119 (1957); the second, *Florida's Streams—Water Rights in a Water Wonderland*, may be found in 10 U. FLA. L. REV. 294 (1957).

A table of headings and subheadings is appended at the end of this article.

The authors have benefited from a review of a treatment of this general subject in a review-draft manuscript prepared, largely by Cletus Howard, as part of a study of water-rights law in Minnesota, Wisconsin, Indiana, and Ohio that is being conducted by the University of Wisconsin under a contract with the United States Department of Agriculture.

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¹See THOMAS, *HYDROLOGY V. WATER ALLOCATION IN THE EASTERN UNITED STATES* 9-10 (1956).

²The unqualified work *lake* as used in this section will mean a natural lake.

³*Hardin v. Jordan*, 140 U.S. 371 (1891); see 93 C.J.S., *Waters* §103 (1956).

of origin and attained stage in its life history are reflected in the type and quantity of accumulated organic deposits in the lake and in the composition of the water itself. These factors in turn determine the types of fauna that the lake can maintain.⁴ Watercourses, on the other hand, especially the larger streams and rivers, are "open" systems; they derive their characteristics from their basic function as conveyors of surplus water from land to sea.⁵

To a greater or lesser extent both the lawyer and the hydrologist have recognized that there is a fundamental difference between a watercourse and a lake or pond, and that this difference is manifested largely by variance in the water movement. At the same time the hydrologist, and more recently the lawyer, has recognized that within the totality of waterflow in its natural stages — the hydrologic cycle — there is a close and continuing relationship among the various natural forms in which water appears. An effort will be made to trace the extent to which the law of lakes and ponds has turned on these differences, or has operated in the light of these relationships.

The general agreement on the characteristics that distinguish a watercourse from a lake does not carry over to the problem of distinguishing a lake from a pond, a marsh, or a swamp. As to these latter distinctions, no generally accepted standards seem to have been developed. The difference between a lake and a pond, if there is one, is one of size: "[T]he pond is larger than a puddle but smaller than a lake."⁶ A marsh would seem to be roughly equivalent to a swamp, and the latter has been defined as wet, spongy, soft low ground saturated with water but not usually covered by it.⁷ For purposes of this article, the term *lake* will include all bodies of water that might be categorized as either lakes or ponds; they will be classed as navigable or non-navigable as the context requires.

PART I. NAVIGABILITY AND PUBLIC RIGHTS

When Florida became a territory of the United States she adopted the common law⁸ and thus placed herself in the stream of Anglo-American water law. This came to include the concept that the state holds title to land under navigable waters in trust for all the people,

⁴See 13 *ENCYCLOPEDIA BRITANNICA* 599, 600 (1953).

⁵See *COKER, STREAMS, LAKES, PONDS* 123 (1954).

⁶*BLACK, LAW DICTIONARY* 1320 (4th ed. 1951).

⁷*Campbell v. Walker*, 137 Ore. 375, 380, 2 P.2d 912, 914 (1931).

⁸FLA. STAT. §2.01 (1959).

and to a large extent public rights became equated with navigability. But title to some of the land underlying Florida rivers and lakes, including some navigable waters, was in private ownership tracing to early Spanish land grants. These grants have been recognized both by federal⁹ and state¹⁰ governments, and they necessarily lead to a variation from the common law as to the title to land under navigable waters. Moreover, the Spanish civil law background of Florida may make it appropriate to apply civil law doctrines as an aid to the resolution of some of her more perplexing water problems. The power to adopt civil law principles when more in harmony with conditions in Florida was specifically provided for in several of Florida's earlier constitutions,¹¹ and it is still employed by the Florida courts when appropriate.¹² An analysis of the Spanish civil law approach to the relationship among navigation, ownership of lake beds, and public rights to make use of water will therefore be undertaken. Since the major water law developments in Florida to date have been based on common law principles, however, these concepts will be examined first.

Early Common Law Developments

The English common law granted or denied private and public rights in natural bodies of water on the basis of whether the water was navigable or non-navigable; if non-navigable, the water as well as the underlying bed would presumably pass into private ownership in the same manner as any other real property; if navigable, the underlying bed might nevertheless pass into private ownership, but the water became impressed with rights accruing to the public that were generally comparable in importance, and sometimes superior, to those of the adjoining landowners.¹³

Throughout the development of these common law doctrines in

⁹See U. S. Treaty with Spain, 8 STAT. 252 (1819); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *United States v. Mitchel*, 40 U.S. (14 Pet.) 24 (1841).

¹⁰See *Hardee v. Horton*, 90 Fla. 452, 108 So. 189 (1925); *Apalachicola Land and Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908).

¹¹FLA. CONST. of 1838, art. 16, §6; FLA. CONST. of 1861, art. 15, §5; FLA. CONST. of 1865, art. 16, §6.

¹²E.g., *Duval v. Thomas*, 114 So.2d 791 (Fla. 1959); *Willis v. Phillips*, 147 Fla. 368, 2 So.2d 732 (1941); *Dade County v. South Dade Farms, Inc.*, 133 Fla. 288, 182 So. 858 (1938).

¹³See *Maloney & Plager, Florida's Streams*, 10 U. FLA. L. REV. 294-97 (1957).

England—a land of many running streams and brooks but few lakes of significance—there appears not to have been an early determination of the applicability of these principles to lakes.¹⁴ Much of the common law governing rights and interests in natural bodies of water found its origin in the watercourse, whether river, stream, or brook. Those American jurisdictions that have followed the common law applied the existing precedents, with local modifications, to their own watercourses; and as the doctrines seemed largely applicable, and perhaps because there was no better authority to follow, they generally applied the same rules to lakes.¹⁵

As the English law first developed, the question of navigability was one of law; and the early courts apparently based their determination of navigability on the ebb and flow of the tide. Tidal waters carried with them the incidents of ownership attributed to navigable waters, while waters not affected by the tides did not.¹⁶

American courts adopted the English concept of navigability but redefined the criteria. Navigability came to mean a factual determination of traversibility, regardless of tides, for general public purposes—quite often stated as commercial purposes, since that was the primary public interest at the time. The result was a tremendous increase in the number and types of bodies of water in which public rights were recognized.

As might have been anticipated, the courts of different jurisdictions have developed varying definitions of navigability, and the broadness or narrowness with which the term has been construed has affected the extent to which public rights to make use of the waters have been recognized and protected in these jurisdictions.

American Definitions of Navigability

Since federal jurisdiction over navigable waters under the com-

¹⁴In 1878 the English House of Lords, in *Briston v. Cormican*, 3 App. Cas. 641, construed these common law rules to be equally applicable to lakes and streams. Because of the late date of the decision, it is not binding precedent in most American jurisdictions, e.g., FLA. STAT. §2.01 (1959); ILL. ANN. STAT. ch. 28, §1 (Smith-Hurd 1959). Nevertheless it has generally been followed in this country; see, e.g., *Hardin v. Jordan*, 140 U.S. 371, 392 (1891); *Turner v. Holland*, 65 Mich. 453, 33 N.W. 283 (1887).

¹⁵E.g., *Turner v. James Canal Co.*, 155 Cal. 82, 99 Pac. 520 (1909); *State v. Korner*, 127 Minn. 60, 148 N.W. 617 (1914); *Proctor v. Sim*, 134 Wash. 606, 236 Pac. 114 (1925).

¹⁶*Middleton v. Pritchard*, 4 Ill. 509, 38 Am. Dec. 112 (1842); *Hooker v.*

merce clause of the United States Constitution reaches into the four corners of the United States and casts an omnipresent shadow over the definitions of navigability proposed by the various states, it should properly be considered first. This test uses the criterion of commercial utility of the body of water in question. Navigability based on the ebb and flow of the tide has been replaced by navigability *in fact*; and "in fact" has usually been taken to mean susceptible of use by commercial traffic.¹⁷

Parenthetically, under federal law "a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken."¹⁸ This has been termed the "reasonable improvability" test.¹⁹ Florida by case precedent is not in accord with this approach. The "natural state" of the water must allow navigation.²⁰

In jurisdictions such as Florida, where the earliest public uses included the movement of logs as a part of lumbering operations, the factual test of navigability tended to become the "saw log test." The courts asked whether the waterway was capable of floating a saw log to market.²¹ This capability did not need to exist throughout all seasons of the year, so long as the water remained high enough to make it usable as a highway for reasonable periods of time.²² The saw log test was adopted by the Florida Supreme Court as early as 1889,²³ and a similar test was applied to a lake in a 1909 case. In finding the lake navigable even though it went dry for such long

Cummings, 20 Johns. R. 90, 11 Am. Dec. 249 (N.Y. 1822). See, however, Annot., 23 A.L.R. 757 (1923).

¹⁷E.g., United States v. Ross, 74 F. Supp. 6 (E.D. Mo. 1947); People *ex rel.* New York Cent. R.R. v. State Tax Comm'n, 258 App. Div. 356, 16 N.Y.S.2d 812 (3d Dep't), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940); Asselin v. Blount, 65 R.I. 293, 14 A.2d 696 (1940).

¹⁸United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407 (1940).

¹⁹Kneeland & Ritchie, *Federal Power Act*, 39 MICH. L. REV. 976, 993 (1941).

²⁰See Lopez v. Smith, 109 So.2d 176 (Fla. 1959); Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).

²¹E.g., Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); Village of Bloomer v. Town of Bloomer, 128 Wis. 297, 107 N.W. 974 (1906); Olson v. Merrill, 42 Wis. 203 (1877).

²²Logan v. Chas. K. Spaulding Logging Co., 100 Ore. 731, 190 Pac. 349 (1920); Hallock v. Suitor, 37 Ore. 9, 60 Pac. 384 (1900); A. C. Conn Co. v. Little Suamico Lumber Mfg. Co., 74 Wis. 652, 43 N.W. 660 (1889).

²³Bucki v. Cone, 25 Fla. 1, 19, 6 So. 160, 161 (1889).

periods of time that crops were planted and harvested on the bed, the Court said:²⁴

"The products of the community at least in some considerable measure may be transported upon the waters if so desired, and the waters are admittedly of considerable area and useful for general navigation in small boats containing persons engaged in pursuits either of business or pleasure. Whether the lake has been used for commercial purposes or not is immaterial, if it may be made useful for any considerable navigation or commercial intercourse between the people of a large area. The fact that the lake goes dry is unimportant, if in its ordinary state it is in fact navigable."²⁵

Today's users of Florida's lakes are much more likely to be small boat enthusiasts desiring to use the water for recreational purposes than loggers "floating to market the products of the country."²⁶ Their right to make use of the waters, assuming that they are not riparian owners, may depend on a finding of navigability. If the water was once used for floating products to market, their right of use will apparently be guaranteed. But suppose it cannot be shown that the water is useful for commercial intercourse of this sort? If a state must apply the measuring device of commercial utility to its waters in order to conform to the federal test of navigability, recreational access by the public may be severely limited.

Is the federal test controlling in state determination of naviga-

²⁴*Broward v. Mabry*, 58 Fla. 398, 412, 50 So. 826, 831 (1909).

²⁵This language indicates a tendency of the Florida Court to move toward a test of current commercial potential rather than a test of commercial history, such as was applied in a recent Minnesota case, *State v. Adams*, 251 Minn. 521, 89 N.W.2d 661 (1957), in its determination of navigability. The Minnesota court, content to hang the crucial question of navigability on the whimsical wanderings of transient fur trappers, applied the test of actual commercial use at the time of the state's birth. The Florida dictum accords with the federal view expressed in *Davis v. United States*, 185 F.2d 938, 943 (9th Cir.), *cert. denied*, 340 U.S. 932 (1950): "The capability of use by the public for purposes of transportation and commerce affords the true criterion of navigability, rather than the extent and manner of that use. . . . 'The evidence of the actual use of streams . . . may be most persuasive, but . . . the susceptibility to use as a highway of commerce may still be satisfactorily proved.'" This holding negates the evidentiary requirement of a prolonged probe into the past and puts the problem on a more practical plane.

²⁶*Bucki v. Cone*, 25 Fla. 1, 19, 6 So. 160, 161 (1889).

bility? Those jurisdictions that answer in the affirmative seem to feel that they are precluded from independence as a result of a mandate from the United States Supreme Court.²⁷ Thus Minnesota has recently reversed itself and overruled an 1893 case, *Lamprey v. State*,²⁸ which had made the state one of the most forthright proponents of a recreational use test of navigability. In two recent cases²⁹ Minnesota held that the United States Supreme Court decisions³⁰ left no room for a separate state definition of navigability. Some courts, however, disagree. They argue that the federal test is mandatory only when the case is one that looks to the United States Constitution for settlement or involves a federal question.³¹

In a 1959 Mississippi case, *Culley v. Pearl River Industrial Comm'n*,³² the Mississippi court was called upon to decide an issue of navigability bearing upon whether the construction by a state agency of a large dam on the Pearl River was in violation of a state constitutional provision that navigable waterways were not to be impeded. The court found the river to be non-navigable at the site of the proposed dam, using a Mississippi statutory definition of navigability which required that for a river to be navigable it must be capable of floating a steamboat with a carrying capacity of 200 bales of cotton.³³ The river may well have been navigable under the federal "reasonable improvability test" set forth above.³⁴ The

²⁷United States v. Holt State Bank, 270 U.S. 49 (1926).

²⁸52 Minn. 181, 53 N.W. 1139 (1893); see Annot., 23 A.L.R. 757, 793 (1923).

²⁹State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957); State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954).

³⁰E.g., United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926).

³¹In United States v. Holt State Bank, *supra* note 30 at 55, the Court said: "Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. *Navigability, when asserted as the basis of a right arising under the Constitution of the United States*, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts." (Emphasis added.)

An earlier U.S. Supreme Court case, United States v. Chandler Dunbar Water Power Co., 229 U.S. 53, 60 (1913), not clearly overruled, said: "The technical title to the beds of navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of *local law*." (Emphasis added.)

³²234 Miss. 788, 108 So.2d 390 (1959).

³³*Id.* at 811, 108 So.2d at 398.

³⁴Kneeland & Ritchie, *supra* note 19.

Supreme Court of Mississippi held, however, that "what 'navigable waters' are is a question of local and not federal law,"³⁵ and approved the project. Apparently no appeal was taken to the Supreme Court of the United States, and the federal government did not see fit to intervene in the litigation.

If the Mississippi approach is a valid one, the federal test can be effectively used by Florida as an initial screen to determine which of its lakes are navigable in the federal sense. By the majority view the states acquired these lakes and the soil under them from the federal government impressed with a trust in favor of the public; they are held by the state in its sovereign capacity and are not subject to conveyance to private individuals.³⁶ The Florida Court has long recognized the existence of such a trust, and has applied the doctrine to lakes in a number of cases.³⁷

But federally navigable lakes need not be looked upon as the only navigable lakes. It is submitted that Florida, for state purposes, has the capacity to classify a lake as navigable according to a state test, even though it is deemed non-navigable by federal standards. If this is conceded, an appropriate criterion for a state as linked to recreation and outdoor endeavors as Florida might well be one that recognizes a test of navigability based on recreational utility rather than commercial use in the limited sense of transportation of goods by boat.

The United States Supreme Court has commented that suitability for commercial navigability can be proved by personal or private use of boats upon the water;³⁸ and Congress, in an amendment to the Rivers and Harbors Act, amplified *commerce* as follows:³⁹

"As used in this section, the term 'commerce' shall include

³⁵234 Miss. at 812, 108 So.2d at 398.

³⁶E.g., *State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303, 82 N.E.2d 709 (1948); *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937); *Baker v. Voss*, 217 Wis. 415, 259 N.W. 413 (1935).

³⁷*Adams v. Crews*, 105 So.2d 584 (Fla. 1958); *McDowell v. Trustees of Internal Improv. Fund*, 90 So.2d 715 (Fla. 1956); *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909).

³⁸*United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

³⁹32 STAT. 372 (1902), as amended, 33 U.S.C. §541 (1958). In *Luscher v. Reynolds*, 153 Ore. 625, 635, 56 P.2d 1158, 1162 (1936), the Oregon court similarly stated: "A boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber."

the use of waterways by seasonal passenger craft, yachts, house-boats, fishing boats, motor boats, and other similar water craft, whether or not operated for hire."

A number of state courts have recently held lakes and streams to be navigable when usable by small boats for recreational purposes,⁴⁰ which one court stated to be "as sacred in the eye of law as its navigability for any other purpose."⁴¹ Other jurisdictions have extended the definition to include capacity for navigation for pleasure and public convenience;⁴² and a recent Ohio case details the gradual evolution of the law of navigability to encompass recreational uses.⁴³

The Florida Court has not as yet been called upon to decide expressly whether its state test of navigability embraces navigation for purely recreational purposes. The language of the Court in such cases as *Baker v. State*,⁴⁴ however, equating navigability with the possibility of use "for purposes common or useful to the public,"⁴⁵ along with the reference in *Broward v. Mabry*⁴⁶ to usefulness "for general navigation in small boats . . . in pursuit either of business or pleasure," may indicate a willingness to include recreational boating in its test of navigability. The commercial and economic value of tourism to Florida, because of her peculiar advantages of climate, location, and environment, might influence the Court to hold that, in Florida at least, pleasure boating is a commercial use of the water. Moreover, a fish camp operator might be the provider of the necessary commercial traffic, since the rental he charges for the use of his craft could be found to furnish the requisite economic interest.

Relationship Between Meandering and Navigability

Title to the land underlying most of Florida's lakes was at one

⁴⁰*E.g.*, *Kerley v. Wolfe*, 349 Mich. 350, 84 N.W.2d 748 (1957) (lake); *State ex rel. Lyon v. Columbia Water Power Co.*, 82 S.C. 181, 63 S.E. 844 (1909) (river); *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 53 N.W.2d 514 (1952) (river).

⁴¹*City of Grand Rapids v. Powers*, 89 Mich. 94, 97, 50 N.W. 661, 662 (1891).

⁴²*E.g.*, *Roberts v. Taylor*, 47 N.D. 146, 181 N.W. 622 (1921) (lake); *Hillebrand v. Knapp*, 655 S.D. 414, 274 N.W. 821 (1937) (lake).

⁴³*Coleman v. Schaeffer*, 163 Ohio St. 202, 126 N.E.2d 444 (1955). See also 56 AM. JUR., *Waters* §181 (1947).

⁴⁴87 So.2d 497 (Fla. 1956); *accord*, *Lopez v. Smith*, 109 So.2d 176 (Fla. 1959).

⁴⁵87 So.2d at 498.

⁴⁶58 Fla. 398, 412, 50 So. 826, 831 (1909).

time held by the state; it was acquired from the United States in one of two ways. If the lake was navigable in the federal sense when Florida became a state, the state as sovereign acquired title to the bed by the grant of statehood.⁴⁷ Title to the beds of non-navigable lakes remained in the United States along with the title to other public lands in the state until Congress in 1850 enacted the Swamp and Overflowed Lands Act.⁴⁸ This act granted to the state her swamp and overflowed lands, including the bottoms of those non-navigable lakes not previously conveyed to private individuals by the United States or the Spanish sovereign.

Immediately following the acquisition of Florida by the United States, the federal government began to determine which lakes were federally navigable and which were non-navigable. The factual determination of navigability was placed in the hands of federally employed surveyors, who were instructed to set aside navigable water bottoms in the original federal surveys of the area. When the surveyors determined that a lake was navigable, they meandered it—in other words, they established a line, called a meander line, which followed the sinuosities of the lake—instead of including it in their rectilinear surveys. When it is realized that each surveyor was left largely to his own discretion in deciding which lakes were navigable and therefore had to be meandered, and that the process of meandering in Florida was often an extremely difficult one because of the generally swampy shorelines of Florida's lakes and the presence of moccasins and other handicaps, it is understandable why no more than 190 of Florida's lakes were in fact meandered in these early surveys.⁴⁹ Given more workable shorelines, it seems probable that a considerably greater percentage of them might have been meandered in the original surveys. In fact an 1855 "Manual of Instructions" issued by the Land Department called for the meandering of "all lakes and deep ponds of the area of 25 acres and upwards."⁵⁰

⁴⁷5 STAT. 742 (1845); *United States v. Champlin Refining Co.*, 156 F.2d 769 (10th Cir. 1946), *aff'd*, 331 U.S. 788 (1947); *Broward v. Mabry*, 58 Fla. 398, 50 So. 862 (1909); *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927).

⁴⁸9 STAT. 519 (1850).

⁴⁹Landrum, *Florida's Fresh Water Lakes*, Civic Information Ser. No. 33 (U. of Fla. Pub. Adm'n Clearing Serv. 1959).

⁵⁰See dissenting opinion in *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452, 496 (1903). Similar instructions appeared in subsequent editions. The stress placed on meandering all lakes and large ponds leads one to question the fact that so few lakes were meandered. See *MANUAL OF SURVEYING INSTRUCTIONS* (1902).

An additional possible explanation for the paucity of meandered lakes could be the fact that many of Florida's lakes have no navigable water connection with the ocean and might therefore have been considered usable for interstate commerce and hence not navigable in a federal sense. However, the fact that a number of the lakes that were meandered are landlocked leads to a discounting of this analysis and raises the question whether they are in fact federally navigable or whether they may not in reality have been acquired by the state through the Swamp and Overflowed Lands Act.⁵¹ Possible misunderstandings on the part of the early surveyors concerning the federal definition of navigability may also have played a part in producing the seemingly inconsistent results.

How much weight will the courts attach to the fact that a lake was or was not meandered when they are called upon to determine whether it is navigable? The Florida Supreme Court has held that the meandering of a stream on the original state surveys is evidence of navigability, but that the final test is whether the watercourse is navigable in fact.⁵² The same rule has been applied to lakes in Florida; as in the stream cases the Court has held that when a lake is meandered the meanders are not necessarily the boundaries of public ownership of the lake bed, so that "if a meandered arm of the lake is not in fact navigable for useful public purposes, the public has no right of access to that area."⁵³ Nevertheless, the fact that a lake was meandered is accepted as evidence of navigability and therefore of public ownership. This makes such a lake available for public recreation.⁵⁴

On the other hand, failure to meander a lake has been held not to be conclusive evidence that it is not navigable. Navigability in

⁵¹This question can perhaps be resolved in favor of the acquisition of the bottoms of such lakes as sovereignty lands by *United States v. Utah*, 283 U.S. 64 (1931), in which the Supreme Court found that certain portions of the Colorado River, though not navigable in interstate or foreign commerce, were susceptible of use as highways of commerce in Utah and hence were "navigable waters of the State of Utah." The Court held that the land under these waters passed to the state when it was admitted to the Union, along with the beds of these waters, which were "navigable waters of the United States."

⁵²*State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908); *Bucki v. Cone*, 25 Fla. 1, 6 So. 160 (1889).

⁵³*Baker v. State*, 87 So.2d 497 (Fla. 1956).

⁵⁴The number of these lakes is not nearly so great as one might expect. The writer of a recent feature article states: "Florida has long boasted of its 30,000 named fresh water lakes. Actually only 182 of these lakes are clearly and legally in public ownership." *All Florida Magazine*, Dec. 7, 1958, p. 8.

fact is again the test.⁵⁵ This would seem to open up the possibility that additional non-meandered lakes may be available for public use. In fact, such a lake in Orange County was recently held to be navigable, and a group of riparian owners were ordered to remove certain fills that they had placed beyond the high-water mark.⁵⁶ The Court of Appeal for the Second District upheld the finding of navigability.⁵⁷

The effect of decisions of this sort is to upset conveyances of long standing from the Trustees of the Internal Improvement Fund as violative of the sovereign trust. This may well lead the courts to proceed with caution when there is doubt as to the navigability of a lake the bottom of which was conveyed by the Trustees, on the theory that the Trustees were dealing with swamp and overflowed lands. Of course the establishment of navigability in this fashion can proceed only on a lake-by-lake basis and over the vigorous opposition of the apparent title holders of the bottoms.

These difficulties suggest the need for exploration of possible means by which a public right of use of at least some of Florida's lakes can be reconciled with private ownership of the lake bottoms.

Florida's Trust Doctrine

Original adoption of a different legal position vis a vis the "trust" doctrine could have averted the reconciliation problem. A substantial minority of American jurisdictions take the position that a state may convey title to lands underlying navigable waters, subject to a public right of navigation.⁵⁸ This view has the backing of able writers in the field,⁵⁹ but a majority of the courts have adopted the "trust"

⁵⁵State v. New, 280 Ill. 393, 117 N.E. 597 (1917).

⁵⁶Crews v. Adams, 11 Cir. Fla., Apr. 16, 1959, per Pattishall, J.

⁵⁷Adams v. Crews, 105 So.2d 584 (2d D.C.A. Fla. 1958).

⁵⁸E.g., Turk v. Wilson's Heirs, 266 Ky. 78 (1936); California Co. v. Price, 225 La. 706, 74 So.2d 1 (1953); Hogue v. Glover, 302 S.W.2d 757 (Tex. Civ. App. 1957).

⁵⁹1 FARNHAM, WATERS AND WATER RIGHTS §53 (1904); Fraser, *Title to the Soil Under Public Waters—The Trust Theory*, 2 MINN. L. REV. 429 (1918); Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542, 567-82; Annot., 23 A.L.R. 757, 765-73 (1923). Fraser takes the position that the American courts erroneously overlooked the English common law distinction between fresh-water beds and tidal water beds, the former of which had been so generally granted by the Crown that prima facie title to them was in the riparian owners, while the latter were so seldom granted that prima facie the Crown still retained title to them. American courts changed the rule as to tidal

approach.⁶⁰ Florida has aligned herself with the majority view and has taken the position that the state holds title to the lands under navigable waters in trust for the people.⁶¹ The Supreme Court has stated that this trust cannot be wholly alienated. Title to limited portions of the land under navigable waters may be granted to individuals when this will result in improvements in the public interest, but disposal of major portions of the bed of a navigable body of water will be a violation of the trust.⁶²

The doctrine was first applied in Florida in cases involving tidal lands, a type of water bottom to which even the critics of the doctrine agree it is appropriately applied. But it was used in 1909 to deny the power of the state to convey a part of the bed of a navigable lake,⁶³ and its application in a number of recent lake cases⁶⁴ consolidated the trust doctrine in this area of Florida law.

The minority view, allowing private ownership of navigable lake bottoms but recognizing a public easement for purposes of navigation, would have given more protection to public recreational interests. Under either view, the title to small non-navigable lakes

waters from a presumption to a rule of substantive law, applicable either to tidal or fresh waters. See Fraser, *Title to Soil Under Public Waters, A Question of Fact*, 2 MINN. L. REV. 313, 322-23, 326 (1918). The Supreme Court of Florida finds further justification for adopting the trust theory, however, in its interpretation of the Spanish civil law, under which such lands were held prior to the cession of Florida to the United States in 1819. The Court finds that the Spanish law apparently recognized that lands under navigable waters were held by the king as "res communes" for public uses and that sale of these lands to individuals was contrary to the general laws and customs of the realm, so that while grants could be expressly authorized by the Crown, they would be strictly construed against the grantee for the protection of the public. *Apalachicola Land and Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923). See also *Geiger v. Filor*, 8 Fla. 325 (1859). It is only fair to point out, however, that the references to Spanish law are made in connection with rights in land under tidal waters rather than fresh waters. Spanish law with respect to ownership and use of lakes will be discussed at a later point in the text.

⁶⁰E.g., *State v. City of Cleveland*, 150 Ohio St. 303, 82 N.E.2d 709 (1948); *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937); *Baker v. Voss*, 217 Wis. 416, 259 N.W. 413 (1935).

⁶¹*Holland v. Ft. Pierce Fin. and Constr. Co.*, 157 Fla. 649, 27 So.2d 76 (1946); *Hicks v. State*, 116 Fla. 603, 156 So. 603 (1934); *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909).

⁶²*Broward v. Mabry*, *supra* note 61, at 398, 50 So. at 829. Statutes authorizing improvements in streams and in tidewater areas are based on this limited power.

⁶³*Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909).

⁶⁴See note 37 *supra*.

can be vested in private individuals; and these individuals will have the right to control the lakes completely, with no rights reserved to the public.⁶⁵ There are many medium sized lakes, however, that are more or less useful to the public but which, at least when the state was relatively undeveloped, may not have appeared to have sufficient public usefulness to warrant retaining title in the public. In a jurisdiction following the rule that land under navigable waters can be privately held, but that the right of the public to use the waters for purposes connected with navigation is impliedly reserved in conveyances by the state, a later determination of navigability would not divest the private owners of any property interests. In such a jurisdiction the right to public navigation can co-exist with private ownership of the bottom.

Since the trust doctrine in Florida is neither constitutional nor statutory in origin but is a product of the courts,⁶⁶ it is subject to reinterpretation by them without doing violence to any legislative pronouncements. Neither title nor incidents of ownership of the beds of the waters would be infringed if the doctrine were to be extended to include a class of lakes navigable by state though not federal standards, but with the trust applied to the waters and not the bottom. Finding a trust of this sort could be the basis for recognition of an easement for navigation without invalidating earlier conveyances.

Such an easement approach has been adopted by the Supreme Court of Oregon,⁶⁷ which held a lake one mile long and one-eighth mile wide to be navigable in a state but not a federal sense. The court found ownership of the bottom to be in a private grantee, while at the same time stating that "the public has an easement for purposes of navigation" in the lake.⁶⁸ The policy argument of the

⁶⁵See 1 FARNHAM, WATERS AND WATER RIGHTS §58a (1904).

⁶⁶*Perky Properties, Inc. v. Felton*, 113 Fla. 432, 151 So. 892 (1934); *Deering v. Martin*, 95 Fla. 224, 116 So. 54 (1928); *Broward v. Mabry*, *supra* note 63; *Adams v. Crews*, 105 So.2d 584 (2d D.C.A. Fla. 1958).

⁶⁷*Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936). For a similar approach see Comment, *Are We Losing Our Lakes?*, 3 S.D.L. Rev. 109 (1958).

⁶⁸153 Ore. at 634-35, 56 P.2d at 1162. The court quoted with approval a four-fold classification of water bodies from an earlier Oregon case: "(1) Those in which the tide ebbs and flows, which are technically denominated navigable, in which class the sovereign is the owner of the soil constituting the bed of the stream and all rights to it belong exclusively to the public. (2) Those which are navigable in fact for boats, vessels, or lighters. In these the public has an easement for the purposes of navigation and commerce, they being deemed public

Oregon court is certainly applicable to Florida and is worth quoting:⁶⁹

"There are hundreds of similar beautiful, small inland lakes in this state well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acceptance of such terms. As stated in *Lamprey v. State*, . . . 'To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.' Regardless of the ownership of the bed, the public has the paramount right to the use of the waters of the lake for the purpose of transportation and commerce."

Possible Statutory Extension of Navigability

In addition to the possibility of a judicial broadening of the definition of navigability, Florida might make use of the legislative process to define navigability to include use for boating for recreation. In a number of early cases the Florida legislature did attempt to create the presumption that various watercourses were navigable.⁷⁰ The apparent purpose of much of this legislation was to create a presumption of navigability as a basis for memorializing Congress to appropriate money for the improvement of navigation

highways for such purposes, although the title to the soil constituting their bed remains in the adjacent owner, subject to the superior right of the public to use the water for the purposes of transportation and trade. (3) The streams which are so small and shallow that they are not navigable for any purpose, the public has no right to whatever. (4) To this list may be added our larger rivers susceptible of a great volume of commerce where the title to the bed of the stream remains in the state for the benefit of the public."

The court went on to say: "We think Blue Lake comes within the above second classification where title to the bed is in the adjacent owners, subject however to the superior right of the public to use the water for the purposes of commerce and transportation."

⁶⁹153 Ore. at 635, 56 P.2d at 1162. The court defines "commerce" as having "a broad and comprehensive meaning. It is not limited to navigation for pecuniary profit. A boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber."

⁷⁰E.g., Fla. Laws 1872, ch. 1907 (Alaqua Creek); Fla. Laws 1860, ch. 1220 (Withlacoochee River); Fla. Laws 1849, ch. 291 (East River).

in particular streams.⁷¹ No attempts to declare lakes navigable in this fashion were located, nor has any across-the-board redefinition of navigability been attempted. The Wisconsin legislature has broadly defined the term,⁷² however, and this definition has been commented on favorably by the Wisconsin court.⁷³

But a statutory extension of navigability in Florida, without more, might arguably result in invalidating earlier conveyances by the Trustees of the Internal Improvement Fund, and political realities indicate very little chance of its enactment.

There is another type of statute that might bring about a desirable extension of public use while upholding existing conveyances. In 1912 the legislature of the State of Louisiana enacted a statute to the following effect:⁷⁴

"[A]ll suits or proceedings of the State of Louisiana . . . or persons to vacate and annul any patent issued by the State of Louisiana, . . . or any transfer of property by any sub-division of the State, shall be brought only within six years of the issuance of patent, provided, that suits to annul patents previously issued shall be brought within six years from the passage of this Act."

The Supreme Court of Louisiana has applied this statute to purported alienations of the beds of navigable waters in two recent cases,⁷⁵ the first of which involved a lake, and held that when the conveyance had been in existence for more than the statutory period the state was forever barred from attacking the validity of the private titles. The cases have been criticized as doing violence to traditional Louisiana concepts of title to the beds of navigable

⁷¹Memorial [No. 2] (1877) (Ocklawaha River); Memorial [No. 3] (1875) (Withlacoochee River); Memorial [No. 4] (1870) (Holmes Creek).

⁷²WIS. STAT. §30.01 (1955) says: "[A]ll rivers and streams . . . whether meandered or non meandered which are navigable in fact for any purpose whatsoever are hereby declared navigable . . . to the extent that no dam, bridge, or other obstruction shall be made in or over the same . . ."

⁷³Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952).

⁷⁴La. Acts 1912, No. 62, now LA. REV. STAT. §9:5661 (1950).

⁷⁵Humble Oil and Refining Co. v. State Mineral Bd., 223 La. 47, 64 So.2d 839 (1953); California Co. v. Price, 225 La. 706, 74 So.2d 1 (1954). See *Lobean v. Trustees of Internal Improv. Fund*, 118 So.2d 226 (1st D.C.A. Fla. 1960), holding the trustees legally estopped to question an invalid Murphy Act tax deed to sovereignty land that they did have the power to convey under a then current riparian act.

bodies of water,⁷⁶ and have resulted in legislation to limit the application of the 1912 statute to lands previously considered susceptible of private ownership.⁷⁷ But the earlier statute may point a way to the solution of Florida's dilemma. A similar statute, if given the same interpretation in Florida, might be used to prevent attacks on titles to submerged lands previously conveyed by the Trustees.

Such legislation, coupled with an extension of the state definition of navigability to include recreational navigation plus legislative recognition of the existence of an easement for public use of the waters, would not be subject to the same criticism on policy grounds as the Louisiana act. The basic purpose of the proposed Florida legislation would be to extend recognition of public rights to bodies of water in which they should always have been recognized, whereas the Louisiana statute as interpreted resulted in stripping that state of valuable mineral assets.

Any legislation recognizing private ownership of navigable lakes should also confirm in detail the public rights reserved in the waters. The Florida Court has often linked the law concerning public rights in navigable waters other than the right of navigation to the theory that the state holds title to the bed in trust for the public. This can be seen in connection with fishing, wharfing, filling, use of shores, and adjustment of lake levels, all discussed in Part II *infra*. Partial legislation here might prove more detrimental to the public interest than no legislation.

Legislation of a somewhat different character was enacted in Florida in 1953. The legislature undertook to declare that navigable waters in Florida shall not be held to extend to any "so-called" waters lying over land conveyed to private individuals prior to that time by the state or the United States. The same law further declared that the submerged lands of any non-meandered lake "shall be deemed subject to private ownership" when conveyed by the Trustees of the Internal Improvement Fund prior to 1903 without reservation for public use.⁷⁸ On its face this legislation creates a strong presumption against the navigability of most of Florida's smaller lakes. But the Supreme Court of Florida in *McDowell v. Trustees of Internal Improvement Fund*⁷⁹ took cognizance of the fact that the

⁷⁶Notes: 15 LA. L. REV. 463 (1955); 14 LA. L. REV. 267 (1953).

⁷⁷LA. REV. STAT. §§9:1007-09 (Supp. 1954).

⁷⁸FLA. STAT. §271.09 (2), (3) (1959).

⁷⁹90 So.2d 715 (Fla. 1956). The Court further stated that if the re-enactment of

legislation had been enacted as part of an act pertaining to tax matters, and found that it was intended to provide a guide for tax assessors rather than to make non-meandered lakes non-navigable as a matter of law. The judicial invalidation of this attempt to declare all non-meandered lakes non-navigable clears the way for legislation that could reconcile private ownership of the beds of non-meandered lakes with recognition of the right of the public to use the waters for recreational purposes when they are navigable in a state sense.

Additional Possibilities for Recognition of Public Rights

The Florida Legislature may have opened the way for access by the public to non-meandered lakes without entering the semantic morass surrounding the concept of navigability. A 1955 act defining the water policy of the state declares:⁸⁰

"The ownership, control of development and use of waters for all beneficial purposes is within the jurisdiction of the state, which in the exercise of its powers may establish measures to effectuate the proper and comprehensive utilization and protection of the waters."

This policy led to the enactment of the 1957 Water Resources Law.⁸¹ Lakes or ponds completely surrounded by land owned by a single owner or by joint tenants are excluded from the operation of the act—thus restricting its coverage to the type of inland lake to which it would be advisable to extend a broader concept of public rights. The Water Resources Law gives the State Board of Conservation broad powers to promulgate rules and regulations to govern the conservation and use of water resources within specially created water development and conservation districts.⁸² These arguably

the statute in its new location in the chapter on grants to riparian owners were made applicable in determining navigability for riparian purposes, it would in its new location be limited in application "in view of §271.06 which renders the entire chapter inapplicable to lakes except tidewater lakes." *Id.* at 717. The *McDowell* case has since been cited as controlling authority in *Adams v. Crews*, 105 So.2d 584 (2d D.C.A. Fla. 1958).

⁸⁰Fla. Laws 1955, ch. 29748, §1 (b).

⁸¹FLA. STAT. §§373.071-.251 (1959).

⁸²FLA. STAT. §373.171 (1959).

may include regulations providing for public use of the water in lakes in the districts. Compensation of riparian owners damaged by such use would be required.⁸³ The procedure would be cumbersome, since it requires creation of special development and water conservation districts, but it might be resorted to if other methods of validating public rights did not prove feasible.

An alternative possibility might be legislation granting the public the right to use non-meandered lakes above a certain size for recreational purposes, and at the same time recognizing the right of riparians to recover damages which they could prove were actually sustained as a result. The extent of potential recoveries under this plan would probably be small, and a fund for the payment of damages might be established by a small addition to the charge for fishing or boating licenses sold in the counties involved. Such a statute, however, would not in itself solve the access problem, since it is extremely doubtful that the legislature could authorize trespassing over private riparian lands to reach the lake.⁸⁴ Moreover, the difficulty of defining and establishing recoverable damages, along with the possible vulnerability of the statute to attack as involving a legislative exercise of eminent domain in situations in which use of that power could not be justified on the ground of public necessity,⁸⁵ suggests that considerable further study will be necessary before deciding as to the feasibility of this approach.

Another alternative might be to establish a dedication of an easement for public use in certain non-meandered lakes. One possible basis for a judicial finding of a dedication would be the stocking of fish in a lake by the state. The Supreme Court of New Jersey has recently held, however, that the fact that the state had stocked a privately owned lake with fish since 1922 did not give the public a

⁸³The Water Resources Law provides that present property rights of persons owning land and exercising existing water rights appertaining thereto shall not be restricted without due process of law or divested without payment of just compensation. FLA. STAT. §373.101 (1959).

⁸⁴A Colorado statute somewhat similar to the one proposed was declared unconstitutional in so far as it authorized a trespass on the land of others, although it provided for recovery of damages in an action in trespass for any property damage done. *Hartman v. Tresise*, 36 Colo. 146, 84 Pac. 685 (1905).

⁸⁵See *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 31, 31 So.2d 483 (1947) (condemnation to create a public hunting and fishing reservation in a remote area held not a public necessity). This eminent domain problem is discussed further in connection with the right of the public to access to navigable lakes, pp. 56-58 *infra*.

right to use the lake.⁸⁶ But a statutory presumption of dedication when a lake has been used by the public and stocked at state expense might fare better. The possibility of establishing such a dedication has recently been recognized by the Minnesota court.⁸⁷

A final possibility, which is currently under consideration in Minnesota, is the granting of special tax treatment to riparians who permit the public to gain access to the water over their riparian lands. Such tax benefits might encourage riparians to grant access when they ordinarily would refuse to do so.

Possible Use of Spanish Civil Law to Bolster Public Rights

The law of Spain approached the problem of the rights of the public to make use of lakes and streams for boating in a different way from the common law. Within Spain itself, the general public had the right to navigate⁸⁸ all rivers and lakes which were capable of supporting navigation the year round, regardless of the ownership of the river or lake.⁸⁹

The Spanish law saw nothing inconsistent in the sovereign's conveying the bottom of a public river to private individuals, while at the same time preserving the right of the public to traverse the water.⁹⁰ In fact, members of the public were free to moor their

⁸⁶Camp Clearwater, Inc. v. Plock, 146 A.2d 527 (N.J. 1958). For a discussion of the effect of a statutory declaration of state ownership of the fish see p. 72 *infra*.

⁸⁷State v. Bollenbach, 241 Minn. 103, 123, 63 N.W.2d 278, 291 (1954), in which the court stated: "[I]t may well be that in the future a public right to hunt and fish on some of the small inland lakes of this state can be grounded in a theory of dedication . . ." See 38 MINN. L. REV. 685, 689 (1954), for an argument that such a statute would be constitutional.

⁸⁸The term *navegar*, or *navigate*, as used in 18th century Spanish law meant simply to make a trip on the water. The purpose of the travel was seemingly immaterial, as was the type of boat. DICCIONARIO DE LA LENGUA CASTELLANA (1734 ed.)

⁸⁹See 3 DOMINIQUEZ, ILUSTRACION Y CONTINUACION A LA CURIA FILIPICA ch. 1, §§86, 90, 131, 132 (1740).

⁹⁰3 DOMINIQUEZ, *op. cit. supra* note 89, §89. It is important to distinguish between land underlying tidal waters and ports, and the beds of rivers and lakes. As to beds of tidal waters, the *ribera del mar*, and ports, conveyance to individuals was contrary to the general laws and customs of the realm. *Id.* §§112, 115, 117 (*ribera del mar*), 120-22 (*puerto*); Apalachicola Land & Development Co. v. McRae, 86 Fla. 393, 98 So. 505 (1923) (involving title to part of the *ribera del mar*); Geiger v. Filor, 8 Fla. 325 (1859) (involving improvement of port). This article concerns itself with the Spanish law with regard to ownership of the

boats or vessels to privately owned shores, and landowners were forbidden to remove trees or posts customarily used by the public for this purpose.⁹¹

In the case of public lakes, ownership was generally retained by the sovereign or was vested in a community, or pueblo. In either case, all members of the public, including strangers to the pueblo, were entitled to use the lake for boating. If ownership was in a pueblo, it had the right to control fishing in the lake.⁹²

Lakes not continuously fed by running water were susceptible of private ownership and could be conveyed in the same manner as other types of private property; but if they had water the year round they were subject to a servitude of navigation and the public was entitled to use them for boating.⁹³ If the water body dried up completely during the dry season, it was not technically classified as a lake, and no public rights of use inhered in it.⁹⁴

It seems clear, then, that under general Spanish law it was not thought inconsistent for the bottoms of certain lakes to be held in private ownership while members of the public retained the right to navigate in the waters. The laws of Spain were in force in the Indies, including Florida, to the extent that laws local to the Indies did not abrogate or modify them.⁹⁵ In so far as the *waters* themselves were concerned, a royal proclamation of 1541 applicable to the Indies provided that "all . . . waters in the provinces of the Indies, [shall] be common to all the inhabitants thereof, present and to come, and that they may freely enjoy the use of them . . ."⁹⁶ This proclamation was apparently not thought to be inconsistent with the conveyance of the bottoms of many Florida lakes to private individuals as a part of land grants from the sovereign.

Because of the civil law background of Florida, the Florida courts might be willing to recognize these Spanish doctrines, along with the declaration of the Spanish sovereign in favor of free use, as aids in sustaining the recognition of public rights in public waters.

beds of rivers and lakes, not the *puertos* or the *ribera del mar*.

⁹¹2 WHITE, A NEW COLLECTION OF LAWS, CHARTERS, AND LOCAL ORDINANCES OF GREAT BRITAIN, FRANCE, AND SPAIN 76 (Philadelphia & Johnson ed. 1839).

⁹²3 DOMINIQUEZ, *op. cit. supra* note 89, §131.

⁹³*Id.* §132.

⁹⁴The temporary water body is referred to as an *estanque*; it is differentiated from the lake, or *lago*. *Id.* §133.

⁹⁵WHITE, *op. cit. supra* note 91, at 24, 25.

⁹⁶2 BALBAS, RECOPIACION DE LEYES DE LOS REYNOS DE LAS INDIAS, Book IV, title 17 (1756).

Access to Non-navigable Lakes by Invitation of Riparians

If other approaches to public recreational use are unsuccessful, there remains the possibility that members of the public may be able to gain legal access to some of Florida's non-meandered lakes by invitation of owners of the lakes. Such owners frequently improve their beach areas and invite the public to make use of this means of access for a fee. Although the legality of such use by non-riparians has not been litigated in Florida, the recent case of *Duval v. Thomas*⁹⁷ has established the civil law rule that each owner is entitled to make use of the entire lake. A reference in the case to enjoyment of the lake by the owner "and his guests"⁹⁸ may provide a point of departure for limited public use of the sort suggested here. Again, early Spanish recognition of public rights to make use of lakes of this sort may be helpful in attaining this end. Other ramifications of this important case are discussed in Part III of this article.⁹⁹

PART II. RIGHTS ATTRIBUTABLE TO NAVIGABLE LAKES

RIGHTS OF RIPARIAN OWNERS¹⁰⁰

Ownership of a tract of land which is in contact with a navigable lake entitles the owner of the land to put the water to an assortment of uses. These uses are often inexactly denominated riparian rights.¹⁰¹ The number and type of these uses have apparently not been limited by the amount of riparian footage owned, nor have they generally

⁹⁷114 So.2d 791 (Fla. 1959).

⁹⁸*Id.* at 795.

⁹⁹See pp. 68-69 *infra*.

¹⁰⁰Because of its Latin roots the term *riparian rights* is perhaps more properly applied to watercourses than to lakes; *littoral* is sometimes used in connection with the latter. For the sake of consistency in terminology, and because in general the rights of an owner on a navigable lake are often similar to if not identical with those on a navigable watercourse, the term *riparian* will be used throughout in relation to both types of navigable water bodies.

¹⁰¹See FLA. STAT. §271.091 (1959): "Riparian rights are those incident to land bordering on navigable waters." See also *Mobile Transportation Co. v. City of Mobile*, 128 Ala. 335, 30 So. 645 (1900); *Tilden v. Smith*, 94 Fla. 502, 113 So. 708 (1927); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 So. 643 (1909); *Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 Pac. 702 (1921).

been limited by the angle which the boundary of the property makes with the water's edge.¹⁰² The extent of the title that the owner must hold in order to claim riparian rights is not clear.¹⁰³ The statements in the reports are usually couched in general terms; a lessee presumably would be entitled to riparian rights.¹⁰⁴

The point at which the upland—the land that borders a navigable body of water—stops and the water begins is the high-water mark. This is the point that separates private rights from public rights; it is the point beyond which the law will not ordinarily permit individual ownership.¹⁰⁵ But to be entitled to riparian rights the owner must prove his ownership of the land to the high-water mark. Should the calls of his deed fail to establish as a matter of law that the lake or other body of navigable water constitutes one of the boundaries of his property, the owner will be without any rights to use of the water other than those he may claim as a member of the general public.¹⁰⁶

When a street parallels the edge of a navigable body of water, separating the upland owner from the water, there are three possible riparian claimants: the upland owner, the original dedicator or his successors, and the public. The upland owner, in the absence of an express grant, must base his claim upon a dedication that is construed to give him title to the whole street. This construction is not generally accepted,¹⁰⁷ and it has been specifically rejected by the Florida Supreme Court.¹⁰⁸ Which of the other two claimants will

¹⁰²See *Hayes v. Bowman*, 91 So.2d 795 (Fla. 1957); *Bade, Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940); Annot., 65 A.L.R.2d 143 (1959).

¹⁰³For the interesting intimation that an owner of filled land may not qualify for common law riparian rights, see *Hayes v. Bowman*, *supra* note 102; *Bay Shore v. Steckloff*, 107 So.2d 171 (3d D.C.A. Fla. 1958).

¹⁰⁴*Lorman v. Benson*, 8 Mich. 18 (1860); *Young v. City of Asheville*, 241 N.C. 618, 86 S.E.2d 408 (1955).

¹⁰⁵*Tampa So. R.R. v. Nettles*, 82 Fla. 2, 89 So. 223 (1921).

¹⁰⁶E.g., *Thiesen v. Gulf, F. & A. Ry.*, 75 Fla. 28, 78 So. 491 (1918) (Pensacola Bay); *Axline v. Shaw*, 35 Fla. 305, 17 So. 411 (1896).

¹⁰⁷See 4 TIFFANY, REAL PROPERTY 107 (3d ed. 1939): "A conveyance of land as bounded 'on' or 'by,' or as running 'along' a highway, will convey to the centerline of the highway, if the grantor owns thereto, unless a contrary intention appears from the conveyance." *Accord*, *Brooks v. City of West Miami*, 41 So.2d 556 (Fla. 1949).

¹⁰⁸*Marshall v. Hartman*, 104 Fla. 143, 139 So. 441 (1932) (Halifax River); see *Sullivan v. Moreno*, 19 Fla. 200 (1882) (plaintiff whose deed described his land as bounded by a street which ran along the shore of Pensacola Bay denied status of riparian ownership).

prevail in a clash of interests must be determined by an examination of the terms of the dedication. In *Tarpon Springs v. Swett*¹⁰⁹ the public claimed, among other things, the right to load and unload goats on Anclote Boulevard, bordering the Anclote River. There had been a grant of an easement for the boulevard to the public. One point of the decision was the holding that there was an implied dedication to the public of the riparian rights in the absence of an express reservation by the dedicator.¹¹⁰

The situation of a road running along the bank of a body of water must be distinguished from that of a road terminating at the water's edge. In the latter case the purpose of the road is to provide a way into the water, and the appropriate riparian rights will be in the owner of the easement — ordinarily the public — regardless of the ownership of the fee.¹¹¹

Once it is established that the owner of the upland has legal ownership to the high-water mark, the question becomes one of locating that mark. In *Tilden v. Smith* the Florida Supreme Court, in determining the location of the high-water mark on Lake Johns, a navigable fresh-water lake in Orange County, quoted with approval from a Minnesota case:¹¹²

“In the case of fresh water rivers and lakes — in which there is no ebb and flow of the tide, but which are subject to irregular and occasional changes of height, without fixed quantity or time, except that they are periodical, recurring with

¹⁰⁹81 Fla. 479, 88 So. 613 (1921).

¹¹⁰*Accord*, *Barney v. Baltimore*, 2 Fed. Cas. 886 (1863) (No. 1029), *rev'd on other grounds*, 73 U.S. 280 (1867); *Brickell v. City of Ft. Lauderdale*, 75 Fla. 612, 78 So. 681 (1918); *Odell v. Pile*, 260 S.W.2d 521 (Mo. 1953). *But see* *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186 (1865). Of course, if the dedication of a street constitutes a vesting of the fee in the public, rather than a mere easement for street purposes, neither the owner abutting on the street nor the original dedicator can lay claim to the riparian rights, since neither will own land in contact with the body of water and the riparian rights will be in the public. *Webb v. City of Demopolis*, 95 Ala. 116, 13 So. 289 (1891); *Danielsville & Comer Tel. Co. v. Sanders*, 209 Ga. 144, 71 S.E.2d 226 (1952); *Village of Lake Bluff v. Dalitsch*, 3 Ill. 2d 53, 114 N.E.2d 654 (1953); *St. Louis v. Missouri Pac. Ry.*, 114 Mo. 13, 21 S.W. 202 (1893); see 1 FARNHAM §144. *But see* *Barney v. Keokuk*, 94 U.S. 324 (1876).

¹¹¹*See* *Marshall v. Hartman*, 104 Fla. 143, 139 So. 441 (1932), and cases cited therein; 1 FARNHAM §144a; *cf.* *Feig v. Graves*, 100 So.2d 192 (2d D.C.A. Fla. 1958).

¹¹²94 Fla. 502, 512, 113 So. 708, 712 (1927). *See also* *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927) (Lake Okeechobee).

the wet or dry seasons of the year — the high-water mark, as a line between a riparian owner and the public, is to be determined by examining the bed and banks, and *ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself.*"

What is the legal nature of the rights that result from riparian ownership? It seems clear that in Florida, as in most Eastern jurisdictions, riparian rights are property, a lawful taking of which necessitates compliance with the requirements of constitutional due process.¹¹³ But while this much may be clear, the precise quality of a riparian right as property is considerably less clear. The legal mind is accustomed to thinking about property as specific rights in relation to particular things and visualizing objects of property that are inert in character and occupy an ascertainable situs, such as buildings and furniture. Jurists, however, have experienced considerable difficulty in their efforts to apply traditional property concepts to an unfettered substance such as water.¹¹⁴ Attempts to solve the problem of who owns the water in a navigable stream or lake resulted in the early determination that there is no private property in the substance of flowing water;¹¹⁵ the most a person can have is a usufructuary right — a right to use the water.¹¹⁶

The rights of a riparian owner in a navigable lake can conveniently be considered under two headings: the right to use the waters without consuming them, though in some circumstances so as to affect their suitability for similar use by others; and the right to use the waters so as to consume them.

¹¹³See *Thiesen v. Gulf, F. & A. Ry.*, 75 Fla. 28, 78 So. 491 (1918); 1 FARNHAM §63; Maloney and Plager, *Florida's Streams*, 10 U. FLA. L. REV. 294, 300 (1957).

¹¹⁴The juridical problem is not a unique one; the question of property in *ferae naturae* has long been perplexing. See, e.g., *Pierson v. Post*, 3 Gaines (N.Y. 1805). The legislatures as well as the courts have wrestled with problems of ownership of air, oil, and gas, and will soon be facing the same difficulties in regard to outer space.

¹¹⁵*Pitkin v. Olmstead*, 1 Root 217 (Conn. 1790); *Symmes v. Prairie Pebble Phosphate Co.*, 64 Fla. 480, 60 So. 223 (1912).

¹¹⁶*Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 555, 81 P.2d 533, 561 (1938), quoted with approval in *United States v. Fallbrook Pub. Utility Dist.*, 165 F. Supp. 806, 824 (S.D. Cal. 1958).

*a. Non-consumptive Uses**Access and Navigation*

Access to a navigable body of water from the upland and navigation from the point of access to distant points on the same body of water or to points on connecting bodies of water are, practically speaking, a continuation of the same act. Yet they involve fundamentally different concepts and raise fundamentally different issues.

The right to enter or to leave the water is a right dependent upon the ownership of the uplands, and thus it is a right subject to exclusive control by the riparian owner. The courts in the vast majority of riparian jurisdictions,¹¹⁷ including Florida,¹¹⁸ consider this right of access to be a valuable property right. They have not hesitated to grant relief to a riparian owner whose access is materially interfered with or destroyed, though some courts have seemingly made an exception when the injury to access is the result of work done by the Government specifically for the improvement of navigation.¹¹⁹

As to the right to navigate—to travel over the surface of the water to distant points, whether for the transporting of agricultural products grown on his riparian lands to market, or for the customers of his fishing camp to reach a better fishing area in the lake, or simply for his own pleasure—the status of the riparian owner is not so clear. A fortiori, he has at least the same rights as any member of the general public.

As noted under the section on wharves, any obstruction in a navigable waterway that is not authorized by law is per se a nuisance;¹²⁰ any member of the public whose passage is interfered with

¹¹⁷See 1 FARNHAM 297; Annots., 21 A.L.R. 206 (1922); 15 A.L.R.2d 318 (1951) (cases on preliminary mandatory injunctions to protect riparian rights).

¹¹⁸Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers Ass'n, 57 Fla. 399, 48 So. 643 (1909); Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78, 78 So. 491, 506 (1918) (dictum); see Hayes v. Bowman, 91 So.2d 795 (Fla. 1957); Tampa So. R.R. v. Nettles, 82 Fla. 2, 89 So. 223 (1921). But see Duval Engr. and Contracting Co. v. Sales, 77 So.2d 431 (Fla. 1954).

¹¹⁹See Annot., 21 A.L.R. 215 (1922). Farnham, who wrote the annotation, criticizes the line of cases establishing this exception. See also Annot., 89 A.L.R. 1156 (1934).

¹²⁰See discussion under "Wharf and Fill," *infra* p. 34; *cf.* Strawn v. City of Leesburg, 6 Fla. Supp. 124 (1954) (city liable for stringing electric wires across navigable lake, causing injury to aircraft attempting to land).

has the privilege of summarily abating or removing the obstruction.¹²¹ When the obstruction is authorized by law, the early cases held that the public right to use the waterway as a highway would yield to other public needs when the general good required it.¹²² Many of these cases involved the power of the Congress or state legislatures to authorize the construction of bridges across navigable rivers,¹²³ although a few of them dealt with the creation of dams.¹²⁴ Little consideration was given to the problem of the riparian owner whose accessibility to connecting networks of waterways may have been impaired or completely blocked.¹²⁵ When the structure involved simply interfered with passage or made it more inconvenient, as was often the case with bridges spanning a river, whatever invasion there was of the riparian's right of navigation was considered the price of progress.¹²⁶

When the obstruction to the navigable waterway completely destroyed freedom of navigation past the structure, the answer was not so easy. The question became in a sense one of the extent of the riparian's right of access. Was his right simply one to enter the water, or did he have a protectible right to pass the obstruction? Communication via a waterway is often a significant element in making riparian property valuable. Nevertheless, some courts have held that the riparian has no protectible interest in navigating a waterway; his right to navigate is simply as a member of the public, and in the absence of some special inquiry he is without remedy.¹²⁷

¹²¹See, e.g., *McLean v. Mathews*, 7 Ill. App. 599 (1880); *Selman v. Wolfe*, 27 Tex. 68 (1863); *Breese v. Wagner*, 187 Wis. 109, 203 N.W. 764 (1925). But see *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239 (1900); 54 L.R.A. 178 (1902).

¹²²See Annot., 59 L.R.A. 33, 44 (1903), and cases cited therein; cf. *Marine Air Ways v. State*, 104 N.Y.S.2d 964, 280 App. Div. 1021 (3d Dep't 1952). See also discussion under "Rights of the Public" *infra*.

¹²³E.g., *Miller v. Mayor of New York*, 109 U.S. 385 (1883); *People ex rel. Howell v. Jessup*, 160 N.Y. 249, 54 N.E. 682 (1899).

¹²⁴E.g., *State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382 (1844); *Woodward v. Webb*, 65 Pa. 254 (1870).

¹²⁵See, e.g., *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

¹²⁶*Carvalho v. Brooklyn & J. B. Turnpike Co.*, 76 N.Y. Supp. 859 (App. Div. 1900); see Annot., 59 L.R.A. 33, 81 (1903). For a recent case see *Marine Air Ways v. State*, *supra* note 122.

¹²⁷*Frost v. Washington County R.R.*, 96 Me. 76, 85, 51 Atl. 806, 809 (1901): "The only right of the plaintiff interfered with . . . was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it

Courts are not in agreement as to what constitutes special injury sufficient to entitle the riparian owner to object.¹²⁸ The fact that one member of the public does a larger volume of business over a waterway than another would seem to be an example of the "different in extent but not in kind" type of injury, for which, on the theory of public nuisance, no private right of action exists.¹²⁹ On the other hand, an owner of property cut off from access to a general system of navigable waterways seemingly is suffering injury different in kind from that of the general public and should be entitled to question the appropriateness of the obstruction, without having to rely on public authorities to take the initiative. Two recent Florida cases raised many of these issues.

The first of these cases was *Webb v. Giddens*.¹³⁰ Giddens purchased a parcel of land located on a small arm of Lake Jackson, a navigable landlocked body of water in Leon County. He set himself up in the business of renting boats to people who came to fish. To reach the main part of the lake his customers passed under a wooden state highway bridge that stretched across an arm of the lake. The State Road Department, in the course of improving the highway, removed the wooden bridge and built a fill completely spanning the arm and effectively blocking Giddens and his customers from the main part of the lake.¹³¹

Giddens sought a declaratory judgment as to his right to access from his land to the main body of the lake. The chancellor rejected the Road Department's argument that Giddens' riparian rights ended when he reached the water from his uplands, and decreed that he had the legal right to access to the main body of the lake for purposes of fishing, hunting, and boating.

. . . . The right was the right of the public The plaintiff only shared in the public right The sovereign had the absolute control of it, and could regulate, enlarge, limit, or even destroy it, as he might deem best for the whole public; and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby." See also *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *Bailey v. Driscoll*, 34 N.J. Super. 228, 112 A.2d 3 (Sup. Ct. 1955).

¹²⁸See Annot., 59 L.R.A. 33, 81 (1903), and cases cited therein.

¹²⁹*Thomas v. Wade*, 48 Fla. 311, 37 So. 743 (1904); see WALSH, *EQUITY* 209 (1930).

¹³⁰82 So.2d 743 (Fla. 1955).

¹³¹The road across the arm of the lake contained a large culvert connecting the arm with the main lake, but the trial court specifically found that the culvert did not provide a practical means of access by boat; the culvert was appar-

On appeal, Justice Hobson, speaking for the Supreme Court, cited *Thiesen v. Gulf F. & A. Ry.*¹³² for the proposition that one of the common law riparian rights was the right of ingress and egress to and from the water over the owner's land. He stated that the question before the Court was whether the denial of ingress and egress deprived Giddens of "a practical incident of his riparian proprietorship."¹³³ The Court held that Giddens' right of ingress and egress would be virtually meaningless unless he were allowed access to the main body of the lake;¹³⁴ the decree of the lower court was affirmed.

*Carmazi v. Board of County Commissioners*¹³⁵ presented the question of whether cutting off access by boat to Biscayne Bay from waterfront property on Little River was deprivation of a property right. Little River is a navigable¹³⁶ stream running through the City of Miami and emptying into Biscayne Bay. Dade County had previously constructed a dam across the river some distance upstream from the point where it joins Biscayne Bay. The effect of the dam was to block egress by boat to the bay for any riparian owners upstream of the dam. It also prevented passage up or down the river past the site of the dam for any members of the public. In 1956 two owners of property above the dam brought suit against the county for an adjudication of their rights and for damages.¹³⁷

While the suit was pending the Central and Southern Florida Flood Control District, a state agency,¹³⁸ petitioned to intervene. The Flood Control District proposed to construct a salt water intrusion dam across Little River considerably further downstream. The petition was granted, and additional parties — the riparian owners along the stretch of the river between the old county dam and the site of the new district dam — were impleaded. In its final decree the trial court found no encroachment upon the property rights of these "riparian owners."

The district court of appeal¹³⁹ distinguished the riparian owner's

ently completely submerged for about 18 months after it was installed.

¹³²75 Fla. 28, 78 So. 491 (1918).

¹³³82 So.2d at 245.

¹³⁴But see *Innis v. Cedar Rapids, I.F. & N.W. Ry.*, 76 Iowa 165, 40 N.W. 701 (1888).

¹³⁵108 So.2d 318 (3d D.C.A. Fla. 1959).

¹³⁶In this case, as in *Giddens*, the characterization as navigable was apparently not questioned.

¹³⁷This suit was eventually dismissed at the trial level.

¹³⁸FLA. STAT. ch. 378 (1959).

¹³⁹An appeal was taken directly to the Supreme Court, which held that it

right to launch his boat in the water immediately adjacent to his property from his right to navigate. He had no private right to navigate on public waters; his right to navigate was a public right which accrued to him because he was a member of the public and not because of any particular riparian status that he might have. When the public lost its right to navigate on Little River the riparian owner likewise lost his.

The difficulty in reconciling this result with the decision in the *Giddens* case is at once obvious. But the Supreme Court's decision in *Giddens* was distinguished as "premised upon equitable grounds due to the unusual facts and circumstances existent in that case." These "unusual" facts and circumstances, however, were that the state left the riparian owner with access only to the water immediately in front of his property. He was thereby prevented from permitting others to enjoy the fruits of his riparian ownership for a fee. In the *Carmazi* case, on the other hand, the riparian owners apparently desired to make personal rather than commercial use of their right of egress. It seems questionable that Mr. Giddens should be specially protected on this basis. The cases are not irreconcilable, however. To the extent that the *Carmazi* decision holds that a riparian owner does not have a private property right to travel over navigable waters, even those adjacent to his uplands, it is consistent with the position taken by many other courts.¹⁴⁰ And *Webb v. Giddens* does not say otherwise. What *Webb v. Giddens* does seem to say is that for travel over a navigable body of water to be materially obstructed by the state there must be an overriding public interest that justifies depriving either the public or the riparian of the enjoyment of this right.

Webb v. Giddens also established that whether such an obstruction is called a public nuisance from which the riparian owner sustains special injury, or whether it is called a private nuisance as to him, the riparian owner has the individual right to object and to have the courts hear his objection.

The conclusion in *Webb v. Giddens* was that replacing a bridge with a dirt fill was an unwarranted deprivation of the right to navigate. In *Carmazi*, once the district court concluded that the plaintiff's rights were in fact merely public rights, it dealt summarily with them. The court stated, "[I]t has long been recognized that governmental

was without jurisdiction to entertain the appeal, and the cause was transferred to the Court of Appeal for the Third District.

¹⁴⁰See notes 127, 128 *supra*.

functions, although they may deprive private interests of certain privileges, are justified as a necessary exercise of the police power for the benefit of the public."¹⁴¹ Yet the only statement in the opinion concerning the necessity for this exercise was that "the necessity for the dam has been found to be in the public interest by a solemn pronouncement of the Congress of the United States."¹⁴²

It may be true that the solemnity with which Congress acts is a consideration, but it seems equally true that before the citizens of Florida are deprived of the use of the state's navigable waterways, other factors should also be considered. Even assuming that the salt-water intrusion problem in the Little River area is serious enough to warrant interference with public navigation—and there appears to be ample evidence that this is the case¹⁴³—there is nothing in the *Carmazi* opinion to indicate that consideration was given to providing means for bypassing the dam.¹⁴⁴ If feasible, such provisions might properly have been made a condition to the withholding from the riparians the broader relief of prohibiting the dam.¹⁴⁵

Fishing, Swimming, and Hunting

Fishing and swimming, although often described as riparian rights, are pleasures which the law generally makes as much available to a non-riparian who can obtain lawful access to the water as to a riparian; and these rights are sometimes referred to as rights held in common with the public.¹⁴⁶ The right to hunt on a navigable lake or other navigable body of water is not customarily spoken of as peculiarly a riparian right, and therefore will be considered *infra* in connection with public rights.

¹⁴¹108 So.2d at 323.

¹⁴²*Ibid.*

¹⁴³See WATER RESOURCES OF SOUTHEASTERN FLORIDA 580-91 and plate 17 (1955) (Geological Survey Water-Supply Paper 1255), documenting the steadily worsening condition of the ground water supply in the Miami area.

¹⁴⁴See WATER RESOURCES DEVELOPMENT BY THE U.S. ARMY CORPS OF ENGINEERS IN FLORIDA 13 (1959) (Okeechobee Waterway, Oklawaha River).

¹⁴⁵For cases granting analogous partial relief see *City of Lakeland v. State ex rel. Harris*, 143 Fla. 761, 197 So. 470 (1940); *National Container Corp. v. State*, 138 Fla. 32, 189 So. 4 (1939).

¹⁴⁶E.g., *Brickell v. Trammell*, 77 Fla. 544, 560, 82 So. 221, 227 (1919) (dictum); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 413, 48 So. 643, 645 (1909) (dictum); see *Adams v. Elliott*, 128 Fla. 79, 87, 174 So. 731, 734 (1937) (dictum). See also 2 FARNHAM 1364.

The English common law, with its penchant for classification and its passion for ownership, considered the right to take fish a right savoring of realty, and held that the exclusive right to the fish was in the owner of the bed.¹⁴⁷ But land lying under water subject to the ebb and flow of the tide was held by the Crown for the benefit of the public, and therefore a public right to fish in these waters was recognized.¹⁴⁸ To the extent that tidewaters rather than privately owned fresh-water lakes comprised a substantial portion of the English waters suitable for fishing, the common law rule did little to deprive the public of fishing rights.

In American jurisdictions the common law precedents have generally insured public ownership of beds of tidal waters and thus guaranteed the public right of fishing in these waters. The English rule as it relates to private rights to fish in non-tidal waters such as inland lakes has received varied treatment at the hands of the courts.¹⁴⁹

When the bed of a navigable lake is held by the state in trust for the people, as it is in Florida,¹⁵⁰ the riparian owner cannot claim the benefit of the English rule. His right to fish must be attributed either to his ownership of land bordering on the lake or, if a public right to fish is recognized, to his being a member of the public. In either case he would not appear entitled to claim an exclusive right.

State power to regulate fishing in navigable waters, including lakes, has never been seriously questioned. Since Magna Charta, regulation of the time and manner of taking fish in navigable waters has been a recognized function of government.¹⁵¹ The regulatory power of the state reaches everyone, including the riparian owner;

¹⁴⁷*E.g.*, *Pearce v. Scotcher*, 9 Q.B.D. 162 (1882); *Reece v. Miller*, 8 Q.B.D. 626 (1882); see 2 FARNHAM 1427; 3 KENT. COMM. 410 (3d ed. 1836).

¹⁴⁸See 2 FARNHAM, WATERS AND WATERCOURSES 1364 (1904), and cases cited.

¹⁴⁹English rule followed: *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146 (1867); *Lambeck v. Nye*, 47 Ohio St. 336, 24 N.E. 686 (1890); *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323 (1896); see *Hood v. Murphy*, 231 Ala. 408, 165 So. 219 (1936); *Adams v. Pease*, 2 Conn. 481 (1818); *State v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278 (1954); *Hooker v. Cummings*, 20 Johns 90, 11 Am. Dec. 249 (N.Y. 1822). English rule not followed: *Hall v. Wantz*, 336 Mich. 112, 57 N.W.2d 462 (1953); *State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940).

¹⁵⁰*Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909); see discussion under heading "Florida's Trust Doctrine," Pt. 1 *supra*.

¹⁵¹See *State v. Head*, 96 Fla. 799, 119 So. 376 (1928); *Ex parte Powell*, 70 Fla. 363, 70 So. 392 (1915) (tidal water); *Bannon v. Logan*, 66 Fla. 329, 63 So. 454 (1913); FLA. STAT. cc. 370, 372 (1959); 2 FARNHAM 1393-95.

this is true even though he has title to the portion of the bed of the lake upon which he fishes.¹⁵²

What has been said by the courts regarding fishing is probably equally true of swimming or bathing, although much of it has been in general terms and by way of dictum.¹⁵³ The few cases that have specifically raised the question of a riparian owner's right to swim in a lake have generally arisen in connection with governmental attempts to limit or prohibit use of the lake when the water is desired as part of the public water supply. No one today questions the state's power to protect and insure the purity of public water supplies. When the regulation is designed to limit public use of water sources, power to protect the public health and welfare¹⁵⁴ or to control and regulate public rights¹⁵⁵ has provided ample basis for almost unlimited regulation.¹⁵⁶ When an effort is made to restrict use by a riparian owner, the concept of private property may bar governmental regulation without compensation.¹⁵⁷

In view of the Florida Court's repeated assertions that a riparian owner has the right to swim and that riparian rights are property rights, it seems clear that a statute or ordinance purporting to prohibit a riparian owner from swimming in adjacent waters without any provision for compensating him for his loss would be an unconstitutional taking of property.¹⁵⁸

¹⁵²*Bannon v. Logan*, *supra* note 151; see *People v. Bridges*, 142 Ill. 30, 31 N.E. 115 (1892); *State v. Lowder*, 198 Ind. 234, 153 N.E. 399 (1926); *Peters v. State*, 96 Tenn. 682, 36 S.W. 399 (1896).

¹⁵³See cases cited note 146 *supra*. See also Annot., 57 A.L.R.2d 561 (1958) ("Rights of Fishing, Boating, Bathing, or the Like in Inland Lakes").

¹⁵⁴*State v. Quattropiani*, 99 Vt. 360, 133 Atl. 352 (1926).

¹⁵⁵*Sprague v. Minon*, 195 Mass. 581, 81 N.E. 284 (1907).

¹⁵⁶*Shreveport v. Conrad*, 212 La. 737, 33 So.2d 503 (1947) (ordinance prohibiting flying over a lake but not prohibiting boating on it upheld).

¹⁵⁷*E.g.*, *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211 (1902); *Richardson v. Beattie*, 98 N.H. 71, 95 A.2d 122 (1953); *George v. Chester*, 202 N.Y. 398, 95 N.E. 767 (1911). See also *Willis v. Wilkins*, 92 N.H. 400, 32 A.2d 321 (1943); Annot., 56 A.L.R.2d 790 (1957). *Contra*, *State v. Heller*, 123 Conn. 492, 196 Atl. 337 (1937), *appeal dismissed*, 303 U.S. 627 (1938); *State v. Morse*, 94 Vt. 387, 80 Atl. 189 (1911).

¹⁵⁸This is in no way inconsistent with the position that maintaining a commercial operation, such as a bathing beach, and causing contamination so as to make the water unsuitable for a public water supply may well be an unreasonable use of the water as against a municipality, itself a riparian owner, and properly enjoined at the behest of the municipality. *Cf.* *Pounds v. Darling*, 75 Fla. 125, 77 So. 666 (1918), discussed under heading "Rights Attributable to Non-Navigable Lakes" *infra*. *Accord*, *Newton v. Groesbeck*, 299 S.W. 518 (Tex. Civ. App.

Wharf and Fill

If a body of water is non-navigable there seems to be little question that the owner of uplands who also owns an adjoining portion of the bed can construct a wharf or pier on his land, as long as it does not unreasonably interfere with his neighbors' use of the water. This is simply a specific application of the ancient tenet that a man may use his property as he sees fit as long as his use is not unreasonable in relation to neighboring uses.

If, however, the body of water is navigable, the riparian owner must be concerned not only with the rights of his fellow riparians but the rights of the public. Prior to the reign of Queen Elizabeth, when Thomas Digges first advanced his theory that the Crown held title to the lands under tidewaters, if the shore owner desired to project a structure into the water for any purpose, he did so without question from anyone.¹⁵⁹ After Digges' theory took hold, wharves placed upon land covered by water were regarded as encroachments upon the property of the sovereign and therefore as purprestures which the Crown could seize and use according to its pleasure. Farnham states that the first statute with respect to the control of Crown lands was passed during the reign of Anne, only a short time after the establishment of the doctrine that wharves upon Crown land were purprestures. He continues:¹⁶⁰

"After the passage of that statute discussion of the question of purpresture or no purpresture no longer appears, but the question in every instance is whether or not the structure is a nuisance. No structure in a navigable water way is a nuisance unless it interferes with the public rights of navigation."

When the American states assumed the rights of sovereignty formerly belonging to the English Crown, many jurisdictions relaxed the sovereign concept of purpresture and conceded that a riparian owner has the right to wharf out from his upland in order to improve his access to navigable water, subject to such reasonable regulations

1927); see *Battle Creek v. Goguac Resort Ass'n*, 181 Mich. 241, 148 N.W. 441 (1914). See also *Harvey Realty Co. v. Borough of Wallingford*, 111 Conn. 352, 150 Atl. 60 (1930). But see discussion under "b. Consumptive Uses" *infra*.

¹⁵⁹See 1 FARNHAM, *WATERS AND WATERCOURSES* 527 (1904).

¹⁶⁰*Id.* at 529.

as the state may impose, and to the public rights of navigation.¹⁶¹ A number of rationalizations for the rule were offered by the courts, but essentially the rule is simply a recognition that the doctrine by which the state holds the title to lands under navigable waters in trust for all the people is designed to protect and promote the public interest rather than to further the sovereign's personal prerogatives. There is no necessity to hinder a riparian owner's use of the water, either in his capacity as a riparian or a member of the public, unless his use unreasonably interferes with the public right.¹⁶²

A few courts have denied the riparian owner the right to erect a wharf upon land under navigable water, and have invoked the common law idea that any construction below high-water mark, without license, is an encroachment which the sovereign may demolish, seize, or rent at pleasure.¹⁶³ In these jurisdictions if a wharf is injurious to commerce or navigation, it constitutes a public nuisance and can be abated or enjoined; if it does not constitute a nuisance but is simply a purpresture, it belongs to the state and can be subject to an action in ejectment.¹⁶⁴

Even in jurisdictions that recognize a common law riparian right to wharf, the wharf cannot extend beyond the point of navigability or otherwise unreasonably interfere with the right of public navigation; if it does it becomes a nuisance and is subject to abatement.¹⁶⁵ The right of the state to regulate the erection of wharves, including absolute prohibition if necessary to protect the public good, has

¹⁶¹*E.g.*, *New York, N.H. & H.R.R. v. Long*, 72 Conn. 10, 43 Atl. 559 (1899) (Thomas River); *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644 (1868) (Ohio River); *Delaplaine v. Chicago & N.W. Ry.*, 42 Wis. 214 (1877). See also *Dutton v. Strong*, 66 U.S. (1 Black) 23 (1861) (Lake Michigan); *Illinois v. Illinois Cent. R.R.*, 33 Fed. 730 (C.C.N.D. Ill. 1888), *aff'd*, 146 U.S. 387 (1892); *Annot.*, 40 L.R.A. 735 (1905).

¹⁶²A number of these early cases involved ports and harbors where loading and unloading of deep-draft vessels was a major link in the conduct of trade. If the riparian owner could not erect a wharf no one could; the erection of a wharf by a stranger, including the state, would be an interference with the upland owner's right of access, a right everyone recognized. See 1 FARNHAM 537, n.14.

¹⁶³*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118, 89 Am. Dec. 164 (1866) (San Francisco Bay); *Revell v. People*, 177 Ill. 468, 52 N.E. 1052 (1898); *Bowlby v. Shively*, 22 Ore. 410, 30 Pac. 154 (1892), *aff'd*, 152 U.S. 1 (1893). See also *Martin v. O'Brien*, 34 Miss. 21 (1857).

¹⁶⁴*People v. Davidson*, 30 Cal. 379 (1866).

¹⁶⁵*E.g.*, *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302 (1872), *modifying* 29 Ind. 364, 95 Am. Dec. 644 (1868) (Ohio River); cases cited note 161 *supra*.

never been much in doubt; and many states have enacted such legislation.¹⁶⁶

The first Florida statute was the Riparian Act of 1856.¹⁶⁷ The act stated that it is for the benefit of commerce that wharves be built and warehouses erected to facilitate the landing and storage of goods, and that the state's proprietorship of submerged lands prevents the riparian owner from improving his water lots. The act therefore authorized riparian owners on any navigable stream, or bay of the sea, or harbor, to wharf out as far as may be necessary to effect the purposes described. It prohibited obstruction of the channel and provided that space be left for the requirements of commerce. It further authorized the riparian owner to fill in the area in front of his uplands, and provided for the vesting of title to such improved lands in the riparian owner. The mass of litigation involving this act and its 1921 successor, the Butler Bill,¹⁶⁸ and the abuses to which the acts lent themselves¹⁶⁹ are beyond the scope of this article.¹⁷⁰ These acts by express proviso excepted lakes, other than tidewater lakes, from their operation.

In the first case construing the Riparian Act of 1856, the Court denied the plaintiff, who claimed the fee in a street that had been dedicated to the public and that ran down to the Gulf of Mexico, the right to wharf, on the ground that he did not have the type of ownership contemplated by the act.¹⁷¹ In discussing the plaintiff's contention that the defendant's wharf would be a nuisance the Court stated that wharves are indispensable to commerce, and that no city or town could be without them. The question of whether the wharf would be injurious was one of fact.

In *Sullivan v. Moreno*¹⁷² a wharf extending into the waters of Pensacola Bay was attacked as a public nuisance. The Court considered that the argument was based on the view that the construc-

¹⁶⁶*E.g.*, FLA. STAT. §253.122 (1959) (the state bulkhead act, but apparently not applicable to fresh-water lakes, rivers, and streams); see 1 FARNHAM 544, n.2, 545, n.3, 550, n.13, and cases cited therein; 40 L.R.A. 635, 640 (1905).

¹⁶⁷Fla. Laws 1856, ch. 791. See also FLA. STAT. ch. 309 (1959) (deposit of material in tidewater regulated).

¹⁶⁸Fla. Laws 1921, ch. 8537.

¹⁶⁹See the candid remarks of Drew, C.J., and Roberts, J., in *Trustees of Internal Improvement Fund v. Claughton*, 86 So.2d 775 (Fla. 1956).

¹⁷⁰See Hunt, *Riparian Rights in Florida*, 8 U. FLA. L. REV. 393, 395 (1955), for a brief discussion of these acts.

¹⁷¹*Geiger v. Filor*, 8 Fla. 325 (1859).

¹⁷²19 Fla. 200 (1882).

tion of a wharf in navigable waters is per se a nuisance in this state, a view the Court declared to be in error. It considered a wharf a purpresture, the construction of which was subject to sovereign control, but stated that the sovereign by the Riparian Act of 1856 had expressly authorized construction of wharves in tidal bays. The conclusion was that "a plaintiff makes no case of nuisance by a simple allegation of the construction of a wharf" ¹⁷³

In the absence of express authorization by the sovereign, does a riparian owner in Florida have a right to erect and maintain a wharf on sovereignty lands in front of his uplands, for example, on a fresh water navigable lake? The Florida position is not at all clear. Apparently there have been no cases directly involving wharves built into lakes, but two cases have arisen involving piers built into the Atlantic Ocean. In the first, *Freed v. Miami Beach Pier Corp.*,¹⁷⁴ the plaintiff, who owned an ocean front lot adjacent to the defendant, claimed that the defendant's pier transgressed upon the plaintiff's riparian rights. The Court set the stage with the statement that "the Riparian Acts of 1856 . . . and 1921 . . . are applicable only to 'any navigable stream or bay of the sea or harbor.' The locus in quo here is on the ocean front."¹⁷⁵ The opinion states:¹⁷⁶

"Riparian or littoral owners to ordinary high-water mark on the ocean or gulf or other navigable waters have, by the common law, a qualified right with the consent or acquiescence of the state . . . to erect wharves or piers or docks in front of the riparian holdings to facilitate access to and the use of the navigable waters, subject to lawful state regulation If such wharves or piers or docks are erected without due authority, they may be removed as purprestures, or if they are or become nuisances or are harmful to the rights of the public, they may be removed or abated by due course of law."

The only authorization from any agency of the state that the defendant could muster for his pier was a 1925 resolution of the City of Miami Beach stating that it had no objection to this particular

¹⁷³*Id.* at 229. See also *Hicks v. State*, 116 Fla. 603, 156 So. 603 (1934) (wharf on navigable Lake Santa Fe authorized by permit from Trustees of Internal Improvement Fund).

¹⁷⁴93 Fla. 888, 112 So. 841 (1927).

¹⁷⁵*Id.* at 899, 112 So. at 845.

¹⁷⁶*Id.* at 898, 112 So. at 844. (Emphasis added.)

pier.¹⁷⁷ The plaintiff was denied relief on the ground of laches, although the Court carefully pointed out that "the sovereign rights of the state . . . in the premises are not affected by this adjudication."¹⁷⁸

In *Adams v. Elliott*¹⁷⁹ the plaintiff was injured when a car in which she was riding collided with one of the pilings supporting the defendant's pier, which extended over the beach into the ocean at Atlantic Beach. The pier stood some twenty feet above the ground and extended into the ocean a considerable distance. The Court stated that "riparian or littoral upland owners may construct appropriate piers or wharfs [sic] over and across the beach to reach the water for authorized purposes,"¹⁸⁰ but that if piers or their supports are negligently maintained, and the negligence is the proximate cause of injury to one lawfully and with due care traveling on the beach,¹⁸¹ the pier owners will be subject to legal liability.

The most direct statement concerning the riparian owner's right to wharf in the absence of an express legislative grant appears in the 1931 case of *Williams v. Guthrie*.¹⁸² Justice Brown, joined by two of the other justices in a concurring opinion,¹⁸³ stated that he was inclined to the view that the riparian proprietor holding title to the high-water mark, in the absence of any statute to the contrary, is vested with the right to wharf out so as to reach a navigable portion of the stream or body of water, subject to police regulation by the state. He added that this doctrine does not change the title to submerged land below high-water mark in navigable waters, which remains in the state. The case involved an action in ejectment by one claiming as heir of an alleged owner of a pier built upon the submerged bottom of Sarasota Bay against a defendant claiming as grantee of the owner. The trial court construed the defendant's deed against him and gave judgment for the plaintiff. On appeal to the Supreme Court, the Court stated that if the issue was simply one of construction of the deed the judgment would be affirmed.

¹⁷⁷Two years later the Florida legislature amended the city charter to authorize the city to control the use of submerged lands along the ocean front. Fla. Laws 1927, ch. 13101.

¹⁷⁸93 Fla. at 902, 112 So. at 846.

¹⁷⁹128 Fla. 79, 174 So. 731 (1937).

¹⁸⁰*Id.* at 84, 174 So. at 733.

¹⁸¹Fla. Spec. Acts 1925, ch. 10486, declared this section of the beach to be a public highway.

¹⁸²102 Fla. 1047, 137 So. 682 (1931).

¹⁸³*Id.* at 1054, 137 So. at 685.

But, the Court went on, this wharf, located on land below high-water mark in navigable tide waters, appeared to fall within the category of what is known in the law as a purpresture. The Court stated that a purpresture such as a building or wharf erected without license upon lands below high-water mark may at the suit of the state either be demolished or seized and rented for the sovereign's benefit if not a nuisance to navigation. And "this is true, though it be conceded that in this state riparian owners have the riparian right to construct wharves from the upland to reach the navigable water, when not objected to by the sovereign or specifically forbidden by statute."¹⁸⁴ The conclusion was that the plaintiff, who could recover only in ejectment on the strength of his own title, could not maintain his action; when the recovery sought is of a purpresture, no private suitor has a sufficient title.¹⁸⁵ The Court indicated that other remedies might be available to a riparian proprietor, but did not elaborate on what these would be.¹⁸⁶

It may be well to note at this point that several Florida cases involving other riparian rights contain statements on the right to wharf. These statements are by and large irreconcilably in conflict and can be given little credence. For example, in *State v. Black River Phosphate Co.*,¹⁸⁷ in which the Court attempted to justify the legislative grant in the Riparian Act of 1856, a statement appears to the effect that the purpose of the Riparian Act was to permit riparian owners to wharf out into the waters to facilitate landing, and that the statute was necessary because the "ownership of the

¹⁸⁴*Id.* at 1053, 137 So. at 685.

¹⁸⁵*Accord*, *Bass v. Ramos*, 58 Fla. 161, 50 So. 945 (1909). See also *Leonard v. Baylen Street Wharf Co.*, 59 Fla. 547, 551, 52 So. 718, 719 (1910) (Pensacola Bay): [T]he grantee of [a wharf franchise] had no inheritable interest in the wharf property except as incident to the franchise. It may fairly be assumed that the franchise right was the only property right the decedent had in a wharf that presumably is upon navigable waters not subject to private ownership."

¹⁸⁶The body of water involved here was a bay of the sea—why did not the Court permit the plaintiff the benefit of the Riparian Acts of 1856 and 1921? On petition for rehearing the Court stated that it had not overlooked these acts but that when title to submerged land is asserted to vest in private ownership and not in the state, in which title would otherwise be assumed to be vested, it is incumbent upon the pleader to allege and prove sufficient facts to negative the presumptive title in the state and to show that title to the lands has become vested in private owners. In the Court's view the plaintiff had failed to establish that his wharf was the type of permanent improvement contemplated by the riparian acts.

¹⁸⁷32 Fla. 82, 13 So. 640 (1893).

State and its consequent powers [over beds under navigable waters] were a bar to the riparian owner building such wharves or improving their riparian lots in any of the ways permitted by the statute"¹⁸⁸ On the other hand, in *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n* the Court, in elaborating on the various common law rights available to the riparian owner, said:¹⁸⁹

"Subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like, a riparian owner may erect upon the bed and shores adjacent to his riparian holdings bath houses, wharves, or other structures to facilitate his business or pleasure"

The right to erect a wharf out to the point of navigability is based on the theory that the wharf stimulates the use of the waters for navigation and commerce and thus promotes the public good. In Florida, where the public good is as intimately connected with recreational activity as it is with commercial shipping, a narrow concept of public good would seem inappropriate. Perhaps a riparian owner on a lake who constructs a wharf for his pleasure boat should be limited to a smaller structure than one on a tidal bay who designs his wharf for commercial traffic, but it would seem that the interest of one is as worthy of protection as the interest of the other, as long as neither invades the right of the public.

Assuming that a riparian owner on a navigable Florida lake has a right to erect a wharf, does this right extend to filling and thus raising the submerged lands above the level of the lake? That this is a problem in a number of counties in Florida today is documented by a 1956 water problem study.¹⁹⁰ In the absence of legislation simi-

¹⁸⁸*Id.* at 109, 13 So. at 649. This case has been recently cited, in an otherwise excellent study, as aligning Florida with the jurisdictions denying a riparian owner the right to wharf out into navigable waters. WATER RESOURCES AND THE LAW 54, n.14 (U. of Mich. Law School 1958).

¹⁸⁹57 Fla. 399, 403, 48 So. 643, 645 (1909). See *Thiesen v. Gulf, F. & A. Ry.*, 75 Fla. 28, 78 So. 491 (1918), in which the Court indicates that there is no common law right to wharf out to the channel, but there is a right to wharf out as far as the low-water mark. See also *Deering v. Martin*, 95 Fla. 224, 116 So. 54 (1928).

¹⁹⁰See FLORIDA WATER RESOURCES STUDY COMM'N, REPORT OF COUNTY COMMITTEES ON WATER PROBLEMS (1956) §II.A.6. at 11 (Citrus County), 36 (Highlands

lar to the riparian acts, the right to use the space between the shore and deep water is limited to uses in furtherance of navigation. Therefore, whatever structures the riparian owner in the exercise of his right places there must be in aid of navigation, and he cannot use the space for structures for other purposes.¹⁹¹

A 1953 circuit court case,¹⁹² although involving ocean front rather than lake front property, is of considerable interest. Suit was brought by the county solicitor and the Citizens' League of Miami Beach against the City of Miami Beach and the hotel owners along the beach for an injunction seeking to abate an alleged public nuisance maintained by the hotel owners. The plaintiffs alleged that the hotels extended out over the foreshore of the ocean and requested that the court determine whether the city had authority to issue permits for such structures. The 1927 Florida Legislature had passed an amendment to the charter of Miami Beach empowering the city to fix a harbor line and to control and prohibit the use of submerged land east thereof. In 1948 the Miami Beach City Council passed three ordinances establishing such a harbor line and providing that no bulkhead or other structure should be constructed east of the line. Proceeding under these ordinances, the line was fixed on or east of the foreshore — the beach between high-water and low-water marks — and riparian hotel owners were granted permission to construct bulkheads, fill in, and erect structures out to this line. The result was that in most instances the upland owners took over the beach and foreshore and used them for purposes incident to operating the hotels. The result was to exclude the public from portions of the beach between high-water and low-water marks.

The chancellor held that in the absence of an enabling statute an upland or riparian owner cannot appropriate the state-owned land between ordinary high-water and low-water marks. The court pointed out that, consistent with the trust under which the state holds title to the beds of navigable waters, the state, through legislation, can authorize use by individuals or the public for purposes other than boating, fishing, swimming, and recreation if there is sufficient over-all benefit derived thereby or if the public's use thereof for these primary purposes is not eliminated or unduly withheld. As examples of this type of legislative authorization the court cited the Riparian

and Hillsborough counties), 43 (Lake County), 46 (Leon County), 66 (Pasco County).

¹⁹¹See 1 FARNHAM 549, n.9, and cases cited therein.

¹⁹²State v. Simberg, 4 Fla. Supp. 85 (1953).

Act of 1856 and the statutes designating various sections of beach as public highways. In the court's view, individual operation of a hotel or apartment building adjacent to the foreshore is not of sufficient benefit to the people to justify surrender by the public of that portion of the state-owned beach to the individual. The court therefore enjoined the City of Miami Beach from granting to any upland or riparian owners or any other person authority to construct a sea wall, bulkhead, or any structure other than groynes or jetties on or across the foreshore of the Atlantic Ocean.¹⁹³

Finally, in 1956, the question of a riparian owner's right to fill in a portion of the bed of a navigable lake came before the Florida Supreme Court.¹⁹⁴ Suit was brought by the Trustees of the Internal Improvement Fund to enjoin the riparian owners from dredging in Lake Ariana, a navigable¹⁹⁵ fresh water lake in Polk County, and from using the soil from the lake to build a peninsula extending from the defendant's uplands. The trial court granted the injunction. In their appeal to the Supreme Court the defendants contended, among other things, that if Lake Ariana is in fact navigable, their riparian rights include the right to extend their land out from the shoreline and over the bottom of the lake. The Court dealt with this summarily, stating:¹⁹⁶

"This contention could be colorably maintained, on the state of facts here presented, only by reference to the "Butler Bill" which, however, excluded lakes other than tidewater lakes from its operation. . . . Appellants cannot acquire title to sovereignty lands in this fashion."

View

In *Thiesen v. Gulf F. & A. Ry.*, a 1918 suit for damages by a landowner against a railroad for placing its tracks on land it filled in

¹⁹³After entry of the decree by the lower court the Miami Beach City Council voted 4 to 2 not to appeal the decree.

¹⁹⁴*McDowell v. Trustees of Internal Improvement Fund*, 90 So.2d 715 (Fla. 1956). See also *Adams v. Crews*, 105 So.2d 584 (2d D.C.A. Fla. 1958) (Lake Maitland, Orange County).

¹⁹⁵The defendants recognized the importance of the navigability classification and contended that the lake was in fact and in law non-navigable. Both the trial court and the Supreme Court thought otherwise.

¹⁹⁶90 So.2d at 718.

along the foreshore in front of the landowner's property, the Florida Court stated that in addition to the riparian right of ingress and egress the common law riparian proprietor "enjoys [the right] of unobstructed view over the waters" ¹⁹⁷ The Court apparently felt that such a well-recognized principle of law needed no citation. However, the earlier authorities were silent concerning this "common law" right, ¹⁹⁸ and a search of the precedents involving riparian rights reveals only one other jurisdiction that has mentioned view as a possible incident of riparian ownership. In a 1944 West Virginia case, the court in deciding that the defendant's disposal of effluent from his tannery into a river flowing past the plaintiff's house was not a private wrong for which an action could be maintained, asked itself if the plaintiff had a special right to enjoy the river in its original beauty. The court answered that "a riparian owner has no proprietary right in a beautiful scene presented by a river any more than any other owner of land could claim to a beautiful landscape." ¹⁹⁹ From the viewpoint of the common law, the West Virginia court was on firmer ground than the Florida Court. ²⁰⁰ Thus, when the Florida Court spoke of unobstructed view as a common law right, it introduced a new member into the collection of rights a riparian owner can claim.

Does the concept of unobstructed view give a Florida riparian owner a right not available to riparians in other jurisdictions? In *Thiesen* the Court, after lengthy debate and a rehearing, reversed a directed verdict for the defendant railroad, holding that the defendant's conduct constituted a taking of the plaintiff's property — his right of access to his lands over the waters, and his unobstructed view of the bay — conduct that the legislature could not lawfully authorize without compensation.

¹⁹⁷75 Fla. 28, 58, 78 So. 491, 501 (1918) (Pensacola Bay).

¹⁹⁸*E.g.*, Farnham, in his monumental 3-volume work *WATERS AND WATER RIGHTS* (1904), makes no mention of a common law riparian right of view.

¹⁹⁹*International Shoe Co. v. Heatwole*, 126 W. Va. 888, 892, 30 S.E.2d 537, 540 (1944).

²⁰⁰See, *e.g.*, "But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like . . . abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance." 3 BL. COMM. *217; "Where there is no infringement of a right to light, and where the act complained of is otherwise lawful, no action lies for . . . the obstruction of a view or prospect, even though the value of a house or premises may be diminished thereby," 24 HALSBURY, *LAWS OF ENGLAND* 54-55 (2d ed. 1937), citing cases as early as 1610 and as late as 1931.

Three years later another landowner sued another railroad on a similar set of facts. This time the landowner wanted an injunction to prevent the railroad from continuing its alleged interference with the plaintiff's riparian rights in the Manatee River. The trial court, perhaps impressed by the Supreme Court's view of "view," overruled a demurrer to the complaint. The Supreme Court reversed, pointing out that the railroad structure did not appear to impair the landowner's access to the water materially, and stating that "the right of view is apparently not so obstructed as to warrant an injunction to restrain the lawful erection of an authorized public utility across the navigable river."²⁰¹

In 1927 a different factual situation was presented in *Freed v. Miami Beach Pier Corp.*²⁰² The defendant built a pier forty-five feet long extending into the Atlantic Ocean from its ocean-front lot. The pier was about fifteen degrees short of a right angle to the shoreline, with the result that the outer portion was within lines extended at right angles to the shoreline from the corners of the plaintiff's adjacent lot. The Court stated that the outer portion of the pier did not materially affect the plaintiff's access to and use of the waters. The conclusion was that the partial obstruction to distant view would not justify an injunction when the right of access was not materially impaired, especially since the plaintiff did not seek relief until after extensive construction had taken place at considerable cost to the defendant. In a brief concurring opinion, one of the judges stated that "this right of view [is] one of the most valuable of the rights of the riparian proprietor," but added that the conclusion of the majority was well grounded on the principles of laches and estoppel.²⁰³

A year later the Court in *Deering v. Martin*²⁰⁴ reversed a dismissal of an action to enjoin a sale of submerged lands in Biscayne Bay by the Trustees of the Internal Improvement Fund. Among the grounds acknowledged by the justices as entitling the plaintiff to his day in court was the fact that the proposed development by the purchasers of the submerged land would interfere with and virtually destroy the plaintiff's unobstructed view of the bay.

The doctrine of view was not seen again in the decisions of the Florida Supreme Court until 1954, when the City of Jacksonville

²⁰¹Tampa So. R.R. v. Nettles, 82 Fla. 2, 3, 89 So. 223 (1921).

²⁰²93 Fla. 888, 112 So. 841 (1927).

²⁰³*Id.* at 902, 112 So. at 846.

²⁰⁴95 Fla. 224, 116 So. 54 (1928).

decided to unsnarl its traffic by constructing an expressway bridge in the bed of the St. Johns River. The plaintiff, who owned the uplands in front of the proposed bridge site, sought to enjoin construction of the bridge and to require condemnation proceedings.²⁰⁵ The Supreme Court dealt in almost summary fashion with the plaintiff's allegations of injury to his riparian rights, including view, and held that these rights were not sufficiently injured to warrant compensation. Presumably the plaintiff's access to the water remained essentially unimpaired.²⁰⁶

In the most recent case²⁰⁷ the plaintiff complained that his unobstructed view of Boca Ciega Bay as well as his right of ingress and egress over the waters of the bay from his land to the channel was about to be destroyed by the defendant's proposed extension of a near-by peninsula. The Court recognized that the plaintiff had the rights alleged, but held that the particular facts involved in the defendant's fill would not interfere with them.

Only two of the Florida cases discussed above were decided in favor of the riparian owner who claimed an interference with his right to unobstructed view.²⁰⁸ In both cases other riparian rights, primarily the right to access to the water, were at least equally involved. More significantly, the Court denied relief in the two cases in which access to the water was apparently not materially impaired.²⁰⁹ To date, then, the riparian owner's right to a view of an open expanse of water has not proved to be as inviolate as his more traditional riparian rights, such as ingress and egress. Nevertheless the cases establish aesthetic enjoyment as a judicially protectible interest of the riparian owner, a position easily justified in a state in which a glance at the Sunday newspaper finds "Florida living" equated with water-front ownership. Although none of the cases decided so far have involved lakes, there seems no basis for dis-

²⁰⁵Duval Engr. and Contracting Co. v. Sales, 77 So.2d 431 (Fla. 1954) (St. Johns River).

²⁰⁶See Hunt, *supra* note 170 at 400, suggesting that *damnum absque injuria* might have been the basis for the decision.

²⁰⁷Hayes v. Bowman, 91 So.2d 795 (Fla. 1957).

²⁰⁸Deering v. Martin, 95 Fla. 224, 116 So. 54 (1928); Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918).

²⁰⁹Tampa So. R.R. v. Nettles, 82 Fla. 2, 89 So. 223 (1921); Duval Engr. and Contracting Co. v. Sales, 77 So.2d 431 (Fla. 1954). See also Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956), recognizing the right of view across a public road but holding it subordinate to the right of the public to have the way improved to meet the demands of public convenience and necessity.

tinguishing between an owner on a navigable lake and on a navigable stream, bay, or ocean.

Lake Levels

An owner of land bordering on a navigable lake may wish to raise or lower the lake from its ordinary level for any number of reasons.²¹⁰ Another owner on the same lake may desire to have it maintained at its old level, or raised or lowered in a direction opposite to the first. Moreover, quite often damaging fluctuations in lake levels may be caused by natural conditions. In one Florida county a large lake has several streams flowing into it and one stream flowing out of it. The lake alternates between periods of flooding and periods of very low levels. During flood periods adjoining crop lands are inundated, while during dry periods the fishing industry is seriously curtailed.²¹¹ Water level control is not currently practiced, although undoubtedly much of the difficulty could be alleviated by employment of appropriate controls. On the other hand, overcontrol can cause problems; in some areas conflicts have arisen over control of local water levels by governmental agencies representing conflicting interests.²¹²

Generally speaking, the right of the riparian owner on a lake to have the lake maintained at its ordinary level is similar to the right of a riparian owner on a navigable watercourse to have the flow of the stream maintained. Both rights are well recognized,²¹³ but

²¹⁰*E.g.*, a landowner on a large shallow lake in Hernando County dug a drainage well for the purpose of lowering the lake level and thus providing more pasture land. In dry periods the lake level goes so low that a fish camp operator on the other side of the lake is left high and dry, and the volume of water for fish reproduction is seriously reduced. See FLORIDA WATER RESOURCES STUDY COMM'N, REPORT OF COUNTY COMMITTEES ON WATER PROBLEMS §II.D.1 (1956). In Marion County a large lake in the vicinity of several developed citrus groves was drained. The loss of the water surface as a temperature control resulted in considerably increased frost damage to the groves during subsequent cold snaps. *Ibid.*

²¹¹*Id.* §II.D.1 (Marion County).

²¹²*Ibid.* (Palm Beach County). The recently created Department of Water Resources may provide a means for resolving such conflicts. See FLA. STAT. §§373.141, 171 (1959). The Department has recently acted as coordinator and adviser for the several agencies involved in controlling the level of Lake Tsala Apopka. See FLORIDA DEP'T OF WATER RESOURCES, FIRST BIENNIAL REP. 23 (1959).

²¹³See 2 FARNHAM §§475-77, 477a; 1 FARNHAM 405, n.16; *accord*, Taylor v. Tampa Coal Co., 46 So.2d 392 (Fla. 1950). *But see* State v. Sunapee Dam Co., 70 N.H. 458 (1900) (state can authorize lowering level of lake without providing compensation to riparian owners); *cf.* Martin v. Busch, 93 Fla. 535, 112 So. 274

neither precludes other riparian owners from making reasonable use of the water.²¹⁴ While a riparian owner may be entitled to prevent another riparian from unreasonably lowering a lake, the fact that the lake is considerably below its normal level will not always support an injunction against a riparian owner's withdrawing water for irrigation. If it is shown that the low level is from causes other than the irrigator's pumping, the use may not be found to be unreasonable.²¹⁵

When a lake is above its ordinary level, a riparian owner desirous of having the lake level remain above normal will not be granted an injunction against other riparian owners whose lands are flooded and who plan to drain off the excess water.²¹⁶ A Florida statute²¹⁷ that makes it unlawful to lower the level of a lake of greater area than two square miles without obtaining the written consent of all owners of property abutting on a lake will not alter this result. The Florida Supreme Court has concluded that the statute was not intended to prolong abnormal and unusual conditions, but was intended to prevent a lowering of the normal level of the lake over the objection of the abutting owners.²¹⁸

In addition to actions by individuals, various governmental agencies may be involved in controlling lake levels in Florida. The federal government may exercise regulatory control through the Corps of Engineers or the Secretary of Agriculture. The State of Florida may act through the Department of Water Resources or water control districts. The Corps of Engineers can exercise regulatory authority to protect navigation or provide for flood control. Control of lake levels throughout the Tennessee Valley supplies a large scale example of the use of federal power.²¹⁹ Once this authority was established, it was a simple matter to extend it to development of

(1927).

²¹⁴See note 213 *supra*. See also *Lake Gibson Land Co. v. Lester*, 102 So.2d 833 (2d D.C.A. Fla. 1958) (Lake Gibson).

²¹⁵*Lake Gibson Land Co. v. Lester*, *supra* note 214.

²¹⁶*Tilden v. Smith*, 94 Fla. 502, 113 So. 708 (1927) (Lake Johns).

²¹⁷FLA. STAT. §298.74 (1959).

²¹⁸"This word [level] as used in the statute does not mean the abnormally low level of a lake during one of a series of excessively dry years, or the abnormally high level of a lake during an excessively wet year or series of wet years, but the average of mean level obtaining under fairly normal or average weather conditions, allowing the proper range between high and low water mark in average years." *Tilden v. Smith*, 94 Fla. 502, 512, 113 So. 708, 712 (1927).

²¹⁹*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1935).

water power, as long as improvement of navigation was even remotely involved.²²⁰ An example of the control of lake levels in Florida by the Corps of Engineers is Lake Okeechobee, the level of which is constantly regulated by the Corps.²²¹

Congress has further extended its flood control jurisdiction to include "measures for run-off and water-flow retardation and soil erosion prevention on watersheds"²²² contributing in any way to the control of navigable waters. Implementation of this power through the 1954 Water Protection and Flood Prevention Act, commonly known as the Small Watershed Act,²²³ opens the door for possible federal participation in control of lake levels in numerous Florida lakes.²²⁴

Several state agencies also have varying degrees of authority to control lake levels. The Department of Water Resources of the State Board of Conservation may be involved in two ways. The Board, acting on the advice of the Department, has statutory power to authorize the capture of water in watercourses in excess of average minimum flow and can thus control the use of such water to increase or maintain lake levels.²²⁵ It also can authorize the use of water from lakes in excess of average minimum level;²²⁶ this could result in lowering lakes to that level. Furthermore it has the

²²⁰*Green Bay & Miss. Canal Co. v. Kaukauna Water Power Co.*, 90 Wis. 370, 61 N.W. 1121 (1895), *rev'd sub nom. Green Bay & Miss. Canal Co. v. Patton Paper Co.*, 172 U.S. 58 (1898) (federal authority upheld despite statement of the state court that only 1% of the stream was required for navigation and remaining 99% was used for power).

²²¹Thus in 1956, at the height of a lengthy drought, the Corps notified the Central & Southern Florida Flood Control District that if a minimum lake level should be reached, no more water would be released from the lake for irrigation in the district, since this minimum was considered necessary to protect navigation in the cross-state canal system.

²²²49 STAT. 1570 (1936), 33 U.S.C. §701b (1958).

²²³68 STAT. 666 (1954), as amended, 33 U.S.C. §701 (b) (1958).

²²⁴See Dovell and Tarlton, *The Watershed Act: Its Application to Florida*, 15 ECONOMIC LEAFLETS No. 2 (U. of Fla., Feb. 1956). For a report on the current status of small watershed projects in Florida, see FLORIDA DEP'T OF WATER RESOURCES, FIRST BIENNIAL REP. 25, 26 (1959).

²²⁵FLA. STAT. §373.141 (1) (a) (1959). Such authority could be used, e.g., to bolster the action of the Tsala Apopka Basin Recreation and Water Conservation and Control Authority in establishing an inlet to Lake Tsala Apopka from the Withlacoochee River to divert water into the lake whenever the river is at normal or higher stages. See FLORIDA DEP'T OF WATER RESOURCES, FIRST BIENNIAL REP. 23 (1959).

²²⁶FLA. STAT. §373.141 (1) (a) (1959).

power to authorize the governing board of any legally constituted water management district to perform these activities.²²⁷

In addition to being involved in the controlling of lake levels with respect to excess water, the Board has authority to aid in the conservation of lake water in critical areas through the establishment of water development and conservation districts. It may also promulgate necessary rules and regulations to govern the conservation and use of the water resources of the districts.²²⁸ The Department, however, has not yet found it necessary to invoke this power.

The Florida legislature has specifically authorized the Central and Southern Florida Flood Control District²²⁹ and a number of smaller water control districts²³⁰ to regulate lake levels. A number of the latter districts are already engaged in this activity, and others are planning to enter this field in the near future.²³¹

Assuming that an authorized governmental agency changes the level of a navigable lake to the detriment of riparian owners, do the owners have a basis for complaint? A lake level may be either raised or lowered, and lake level control may also result in increasing or decreasing the flow in the watercourse exiting from it.

If a federal agency controls the lake level and the change can be connected in some way with the improvement of navigation, or with flood control, there will be no federal liability so long as the change does not involve the flooding of land above the ordinary high-water mark.²³² However, an increase in elevation that results in the flooding

²²⁷FLA. STAT. §373.141 (1) (b) (1959).

²²⁸FLA. STAT. §373.141 (2), 171 (1959).

²²⁹FLA. STAT. §387.01 (3) (1959).

²³⁰Alachua County Recreation & Water Conservation & Control Auth., Fla. Spec. Acts 1957, ch. 57-1119, §12; Dead Lakes Comm'n, Fla. Spec. Acts 1955, c. 30786, §3; Lake Apopka Recreation & Water Conservation & Control Auth., Fla. Spec. Acts. 1953, ch. 28315, §11; Oklawaha Basin Recreation & Water Conservation & Control Auth., Fla. Spec. Acts 1953, ch. 29222, §§12, 13; Pinellas County Water & Navig. Control Auth., Fla. Spec. Acts 1955, ch. 31182, §2; Tsala Apopka Basin Recreation & Water Conservation Control Auth., Fla. Spec. Acts 1955, ch. 30653, §12, as amended, Fla. Spec. Acts 1957, ch. 57-1223, §§12, 13; Winter Haven Lake Region Boat Course Dist., Fla. Spec. Acts 1955, ch. 31189, §1.

²³¹See FLORIDA DEP'T OF WATER RESOURCES, FIRST BIENNIAL REP. 21-24 (1959).

²³²This proposition is well established for navigable streams. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *Gibson v. United States*, 166 U.S. 269 (1897). It has been applied to deny compensation for alleged flooding of islands in Lake Okeechobee. *Creech v. United States*, 102 Ct. Cl. 301 (1944),

of land above the ordinary high-water mark may constitute a taking that will give rise to an implied contract to pay just compensation under the fifth amendment.²³³ If, on the other hand, control results in changing the flow of a stream draining a lake, the United States seemingly will be immune from liability for destruction of private interests²³⁴ unless the injury was caused by flooding beyond the ordinary high-water mark.

If a state agency controls the lake level, since the state holds title to the beds of navigable lakes to the high-water mark²³⁵ the agency should be able to raise the level to that height without incurring liability. Any elevation above that level would constitute a trespass by flooding of riparian lands. Although a riparian owner could not sue the state in tort for damages for such a trespass,²³⁶ he presumably could through injunctive proceedings require the state either to reduce the level to the ordinary high-water mark or provide compensation for the "taking" of his land through institution of an eminent domain proceeding.²³⁷

If water control action by a state agency should result in lowering the level of a navigable lake or an outlet stream, would the state be liable for harm to riparian owners? Presumably not, if the control measures could be shown to be reasonably necessary in the public interest for the conservation of the water resources of the state. In such a case the injury would not constitute a "taking" of

cert. denied, 325 U.S. 870 (1945).

²³³*Creech v. United States*, *supra* note 232 (by implication). Flooding of land in and adjacent to non-navigable tributary streams as a result of navigation improvements has been definitely held to be compensable. *United States v. Cress*, 243 U.S. 316 (1917). For a discussion of the possible measure of damages in such cases, see Lassiter & McPherson, *Methods of Compensating Land Owners for Damages Attributed to Public Control of Water Levels: A Case Study of the Islands in Lake Okeechobee, Florida*, 34 LAND ECONOMICS 37 (1958).

²³⁴See 3 U. S. PRESIDENT'S WATER RESOURCES POLICY COMM'N, WATER RESOURCES LAW 25-29 (1950), and cases cited therein.

²³⁵*Holland v. Ft. Pierce Financing & Constr. Co.*, 157 Fla. 649, 27 So.2d 96 (1946); *Watson v. Holland*, 155 Fla. 342, 20 So.2d 388 (1945); *Caples v. Taliaferro*, 144 Fla. 1, 197 So. 861 (1940).

²³⁶*Moreno v. Aldrich*, 113 So.2d 406, 409 (2d D.C.A. Fla. 1959).

²³⁷*State Road Dep't v. Tharp*, 146 Fla. 745, 1 So.2d 868 (1941) (state required to remove fill which raised level of watercourse above normal, reducing fall in plaintiff's mill race, or exercise eminent domain power); *accord*, *Broward County v. Bouldin*, 114 So.2d 757 (1959) (usurpation of complainant's land for use as public road); *State Road Dep't v. Darby*, 109 So.2d 591 (1st D.C.A. Fla. 1959) (washing of fill into complainant's land by diffused surface water).

real property, as in the flooding cases; and the deprivation of riparian usufructuary privileges, if overbalanced by the public benefits from conservation measures, could probably be justified as an exercise of the police power in the general welfare.²³⁸

If the control measures were held to be unreasonable, the agency presumably could be required by injunction to make reasonable adjustments in the level,²³⁹ even though it would, as an instrumentality of the state, be immune from damages for the injury to the riparian.²⁴⁰ Finally, a riparian would not be able to rely on the statute prohibiting the lowering of lakes of greater area than two square miles without the consent of all abutting owners, since that statute applies to "persons" and to state agencies.²⁴¹ Moreover, this statute was enacted in 1915, long prior to the acts authorizing the various agencies to regulate lake levels,²⁴² so that these later acts would take precedence.²⁴³

b. Consumptive Uses

Florida's lakes, and her streams for that matter, have not been looked upon as a source of water supply by major consumptive users of water. Ground water sources have been abundant and easily tapped. A recent study²⁴⁴ indicates that in 1956 only fourteen per cent of all domestic consumption, both rural and urban, came from surface water supplies. A few of the less populous counties²⁴⁵ did utilize surface water sources, and two larger counties²⁴⁶ utilized substantial quantities of both ground and surface water. It is esti-

²³⁸A similar argument in justification of the blocking of navigation on a Florida stream by a salt water intrusion dam was upheld in *Carmazi v. Board of Comm'rs*, 104 So.2d 727 (Fla. 1958). (For detailed discussion of that case see pp. [19-22] *supra*.) See also *Weir v. Palm Beach County*, 85 So.2d 865 (Fla. 1956), denying relief on similar grounds for interference with rights of ingress, egress, and view resulting from improvement of a public road.

²³⁹*Cf.* cases cited note 237 *supra*.

²⁴⁰*Moreno v. Aldrich*, 113 So.2d 406, 409 (2d D.C.A. Fla. 1959).

²⁴¹FLA. STAT. §298.74 (1959).

²⁴²See note 230 *supra*.

²⁴³*Anglin v. Mayo*, 88 So.2d 918 (Fla. 1956); *De Coningh v. City of Daytona Beach*, 103 So.2d 233 (1st D.C.A. Fla. 1958); *Op. ATT'Y GEN. FLA. 057-287*, Sept. 17, 1957).

²⁴⁴FLORIDA WATER RESOURCES STUDY COMM'N PRELIMINARY REP. OF COMM. ON WATER USE 3 (1956).

²⁴⁵Charlotte, Okeechobee, St. Lucie.

²⁴⁶Hillsborough, Palm Beach.

mated that by 1970 less than ten per cent of the approximately 791 million gallons per day needed for domestic consumption — an increase of about 100 per cent over the 378 million gallons per day used in 1956 — will come from the surface water supplies.²⁴⁷

The story of agricultural and industrial uses is the same. Water for irrigation of citrus groves comes almost exclusively from ground water sources. The mining industry takes approximately three fourths of its water from the ground, and the chemical and pulp plants' consumption is about fifty per cent from surface water and fifty per cent from ground water sources.²⁴⁸

Florida's water law with respect to consumptive uses has generally developed within the confines of the riparian system. The earliest cases, usually involving watercourses, put primary emphasis on the right of the riparian owner to use the water for domestic and household purposes, including the watering of farm animals; and these uses were generally referred to as "natural" uses, as distinguished from "artificial" uses, such as for irrigation and manufacturing. As a general rule the riparian owner was permitted to use such water as was necessary for his natural uses regardless of the effect on lower owners on the watercourse. On the other hand, he could not use the water for artificial purposes if it would interfere with the flow to the lower owners. The reasonableness of the use was not a consideration.²⁴⁹ In some states there is a trend toward de-emphasizing the distinction between natural and artificial uses and recognizing in riparian owners a common right in water, with each owner entitled to make such natural or artificial use of the water as is reasonable under the circumstances with regard to the uses of the other riparian owners. Although this change in conceptual approach provides no answers, it perhaps makes the machinery for solution more flexible.

As indicated in an earlier article,²⁵⁰ the state of development of the Florida law with respect to withdrawal for consumptive uses is not too clear. In the early case of *Tampa Waterworks v. Cline*²⁵¹ the Supreme Court of Florida, dealing with the pollution of an underground stream that was used as a source of water supply by the

²⁴⁷See note 244 *supra* at 8.

²⁴⁸*Id.* at 8-23.

²⁴⁹See Maloney, *Florida's New Water Law*, 10 U. FLA. L. REV. 125, 128, n.40 (1957); Maloney and Plager, *Florida's Streams*, 10 U. FLA. L. REV. 294 (1957).

²⁵⁰Maloney and Plager, *supra* note 249, at 305.

²⁵¹37 Fla. 586, 595, 20 So. 780, 782 (1896) (*dictum*).

City of Tampa, restated the riparian rule with the reasonable use modification. Since the case dealt with pollution, it did not establish a binding precedent concerning consumptive use. The decision indicated, however, that when the problem was clearly presented to the Court it would probably adopt the reasonable use aspect of the riparian doctrine and permit diversions that did not unreasonably interfere with use by other riparian owners. In *Taylor v. Tampa Coal Co.* the problem did come before the Court, but the setting was a twenty-six acre lake that was deemed non-navigable. The Court stated:²⁵²

"Except as to the supplying of natural wants, including the use of the water for domestic purposes for house or farm, such as drinking, washing, cooking, or for stock of the proprietor, each riparian owner has the right to use the water in the lake for all lawful purposes, so long as his use of the water is not detrimental to the rights of other riparian owners"

The facts indicated that the withdrawals being made by one of the owners of the lake for irrigation of his citrus grove were materially lowering the lake level, to the detriment of the recreational use being made by one of the other owners, and an injunction limiting withdrawals was affirmed.

In a 1958 case²⁵³ involving withdrawals for irrigation by an owner on a 485-acre non-meandered lake the Second District Court of Appeal, without taking a position as to the navigability of the lake, cited *Taylor v. Tampa Coal Co.* as controlling. However, on the facts it was deemed that the defendant's use was not causing an unreasonable interference with other owners' uses, and an injunction granted by the lower court was reversed.

In times of water shortage all of the interests competing for the available supply insist that theirs is a use that should be the last to be curtailed. In those areas of the state where lakes provide an important source of water supply, the recent dry years created many conflicts between competing owners.²⁵⁴ Presumably domestic

²⁵²46 So.2d 392, 394 (Fla. 1950).

²⁵³Lake Gibson Land Co. v. Lester, 102 So.2d 833 (2d D.C.A. Fla. 1958).

²⁵⁴See FLORIDA WATER RESOURCES STUDY COMM'N, REPORT OF COUNTY COMMITTEES ON WATER PROBLEMS (1956) §II.A.6 at 11 (Citrus County), 36 (Highlands and Hillsborough counties), 43 (Lake County), 46 (Leon County), 66 (Pasco County).

users would have first priority, as they did under the strict riparian system. Once that use was satisfied, the other users would have to share the remaining supply in such fashion as was reasonable under all of the circumstances. Since circumstances would vary from case to case, a final decision on reasonableness as between competing users would rest with the courts. In the event that a water development and conservation district should be created for the critical area under the provisions of the 1957 Water Resources Law,²⁵⁵ an administrative decision concerning the reasonableness of proposed withdrawals might resolve the problem. Such a decision, of course, would be subject to review by the courts.²⁵⁶

Can a municipality claim the benefits of riparian ownership to the extent of withdrawing sufficient quantities of water from a lake to supply its inhabitants, with perhaps the advantage of priority in times of shortage that domestic users ordinarily could claim? A number of Florida cities have experienced salt water intrusion to such an extent that local ground water supplies have become unusable,²⁵⁷ and the cities have gone inland in search of new sources of water. When a city purchases a piece of land bordering a watercourse or lake that is outside its limits and attempts to divert water from it to supply the needs of its people, the courts have not had much difficulty in finding the use unlawful when other riparian owners are injured as a result of the withdrawals. The rationale for such a decision can be that a riparian is not entitled to transport the water beyond his riparian lands,²⁵⁸ or simply that such a use is unreasonable in relation to the other riparian owners.²⁵⁹

It was successfully argued in an early Ohio case²⁶⁰ in which the water supply was within the city's territorial limits that a city is entitled to the privileges of riparian status, including withdrawal of water for municipal purposes. The court concluded that a city located on a stream could draw water for the domestic uses of its inhabitants in the same fashion as any other riparian. With reference to water used for power purposes within the city, the rule of reason-

²⁵⁵FLA. STAT. §373.141 (1959).

²⁵⁶See Maloney and Plager, *supra* note 249 at 146-50.

²⁵⁷See Black, Brown, and Pearce, *Salt Water Intrusion in Florida*, in FLORIDA STATE BOARD OF CONSERVATION, WATER SURVEY AND RESEARCH PAPER NO. 9 (1953).

²⁵⁸See *Elkhart v. Christiana Hydraulics*, 223 Ind. 242, 59 N.E.2d 353 (1945). See also Maloney and Plager, *supra* note 249 at 306.

²⁵⁹See *Stein v. Burden*, 24 Ala. 130 (1854); 56 AM. JUR., *Water* §345 (1947).

²⁶⁰*City of Canton v. Shock*, 66 Ohio St. 19, 63 N.E. 600 (1902).

able use was applied. Only as to water transported beyond the corporate limits of the city did the court prohibit the city from making withdrawals. North Carolina²⁶¹ and Virginia²⁶² have more recently reached the opposite conclusion, largely on the ground that the concept of riparian status contemplates an individual or a family, or perhaps a business, located in close proximity to the body of water involved, and does not include a sprawling city with thousands of inhabitants.²⁶³ It should be noted that such decisions do not necessarily leave the city without recourse, since the power of eminent domain will usually be available as a technique for acquiring a water source, although its use will necessitate compensation to those whose property is taken in the process.²⁶⁴

RIGHTS OF THE PUBLIC

The establishment of navigability is presently the foundation of public rights in Florida's lakes, as in her streams.²⁶⁵ The nature and extent of such rights, however, particularly those involving non-consumptive uses of the water, have received very little judicial or legislative consideration.

There are a number of interrelated problems involved in non-consumptive uses of Florida's navigable lakes, whether these uses are recreational or commercial. Foremost among them are the availability of means of access and the right to go along the shore after access to a lake has been gained. These rights will be considered first and then the right, assuming access has been gained, to various recreational uses, including boating, bathing, hunting, fishing, and scenic enjoyment. Finally, the right to derive commercial benefit from such non-consumptive uses as boating, bathing, and fishing and the power of public authorities to exploit such uses through leases and other means, will be assessed.

²⁶¹*Pernell v. City of Henderson*, 220 N.C. 79, 16 S.E.2d 449 (1941).

²⁶²*Town of Purchaseville v. Potts*, 179 Va. 514, 19 S.E.2d 700 (1942).

²⁶³*Cf. Salem Flouring Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033 (1902) (denying to the state the riparian right to supply the domestic water needs of 1300 to 1500 inmates of a penitentiary and asylum from a nearby water source). For a more extended treatment of the subject see Ziegler, *Acquisition and Protection of Water Supplies for Municipalities*, 57 MICH. L. REV. 349 (1959).

²⁶⁴E.g., FLA. STAT. §361.04 (1959).

²⁶⁵See "Navigability and Public Rights," Pt. 1 *supra*.

Access

The mere fact that a lake is navigable does not guarantee public access to it. As more and more lakeshore property passes into private ownership, the problem of access becomes more and more acute.²⁶⁶ The courts are generally agreed that members of the public have no right to cross private property to reach navigable waters.²⁶⁷ The Florida trespass statute²⁶⁸ seemingly dictates a similar result. Even when the shore was originally owned by the state and later sold into private ownership it has been argued that there was an implied reservation of a way of necessity for public access. This has been rejected as inapplicable when the original unity of title essential to the establishment of an easement of necessity is found only in the state.²⁶⁹

Can the state enact legislation authorizing the crossing of private lands to gain access to public lakes? One such statute was held unconstitutional because no provision was made for compensation of private landowners.²⁷⁰ The Wisconsin legislature has recently authorized the state to exercise its power of eminent domain to gain public access to navigable lakes.²⁷¹ If a lake is non-navigable and

²⁶⁶Figures on the number of Wisconsin lakes without means of public access are collected in Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542, 543. For a popular article pointing up the critical nature of the access problem in Florida, see All Florida Weekly Magazine, Dec. 7, 1958, p. 8.

²⁶⁷See 1 FARNHAM 654; Annot., 53 A.L.R. 1191, 1191-99, (1928), citing Cal., Miss., Mass., Wash., and N.Y. cases.

²⁶⁸FLA. STAT. ch. 821 (1959).

²⁶⁹State v. Black Bros., 116 Tex. 615, 297 S.W. 213 (1927); see 3 TIFFANY, REAL PROPERTY §793 (3d ed. 1939).

²⁷⁰Vt. Acts of 1892, No. 80; New England Trout & Salmon Club v. Mathews, 68 Vt. 338, 35 Atl. 323 (1896). The court indicated that even if compensation were authorized the statute would still be unconstitutional, since it provided for taking of private property for private use. But since individuals could be claiming access under a public right, this part of the opinion seems questionable. Since such a taking would be the equivalent of eminent domain proceedings, however, legislation of this sort, if enacted in Florida, would probably run afoul of the constitutional guarantee of jury trial in such proceedings. FLA. CONST. art. 16 §29. But cf. Barrows v. McDermott, 73 Me. 441 (1882), recognizing the validity of a Massachusetts colonial ordinance giving members of the public a right to cross unenclosed woodlands to gain access to great ponds. However, this ordinance is no longer recognized in Massachusetts itself. Slater v. Gunn, 170 Mass. 509, 49 N.E. 1017 (1898).

²⁷¹WIS. STAT. §§59.07, 60.18(15), 61.34(3) (1955) (county, town, and village boards given authority to condemn land for public access to navigable waters and

completely surrounded by privately owned lands, however, there is seemingly no right in the public to use it and therefore no basis for a condemnation proceeding to gain access to it.²⁷²

Private owners on a lake may not be alone in their desire to prevent opening of the lake to the public. Commercial interests controlling limited means of access may join forces with the riparian.²⁷³ But the availability of Florida's lakes to recreational users can be a source of economic strength to the entire state, for once public access is available, accommodations for visitors need not be riparian to cater to their needs successfully. In Wisconsin the power of the state,²⁷⁴ counties,²⁷⁵ and municipalities²⁷⁶ to condemn rights of way for public highways to navigate waters is specifically spelled out. In addition, a state platting statute requires that when subdivisions are laid out on land abutting a lake or stream roads must be provided affording access to the water at not more than one-half-mile intervals along the shore.²⁷⁷ The 1959 Florida Legislature authorized the State Road Board to establish access roads to public waters but specifically denied the Board condemnation powers for this purpose.²⁷⁸ It remains to be seen how effective the new statute will be without this power.

If a county can obtain land on a navigable lake for a public park, either by gift or purchase, or possibly even by eminent domain proceedings, it may then be feasible for the county to exercise its power of eminent domain to condemn a right of way to the park. In this way the limitation on the condemnation powers of the State Road Board could be avoided. The statute granting eminent domain powers to Florida counties is worded broadly enough to permit such

additional land for recreational purposes).

²⁷²*Osceola County v. Triple E. Devel. Co.*, 90 So.2d 600 (Fla. 1956); *accord*, *Turner v. Selectmen of Hebron*, 61 Conn. 175, 22 Atl. 951 (1891).

²⁷³*E.g.*, a 1957 Wisconsin bill to authorize condemnation of rights of entry to navigable lakes was opposed by the Resort Ass'n of Wisconsin as a threat to the resort industry. See Waite, *supra* note 266.

²⁷⁴Wis. STAT. §23.11 (2) (1957), applicable when the state conservation commission has riparian lands under its supervision.

²⁷⁵Wis. STAT. §23.09 (14) (1957).

²⁷⁶Wis. STAT. §60.18 (15) (1957).

²⁷⁷Wis. STAT. §236.16 (3) (1957), as amended, Wis. Laws 1957, c. 88, §6. For further discussion see Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335, 368-71. See also Waite, *Land Use Controls and Recreation in Northern Wisconsin*, 42 MARQ. L. REV. 271, 287-94 (1959).

²⁷⁸FLA. STAT. §335.16 (1959).

a taking.²⁷⁹ However, the issue of whether a park on a lake, or an access road to such a park, can meet the eminent domain requirement of "public necessity"²⁸⁰ has not yet been squarely decided by the Florida courts. Although the Supreme Court has not found this necessity in the two cases that have reached it so far,²⁸¹ a concurring opinion in one of them indicates that both of these purposes may be sustained in an appropriate situation.²⁸²

Passage Along the Shore

If a member of the public has gained access to a navigable lake, does he have the right to travel along the shore? The answer in most jurisdictions is "No,"²⁸³ based either on the theory that the riparian owner holds title to the low-water mark and hence has the right to enjoin "trespassers" between the high-water and low-water marks,²⁸⁴ or on the broader basis that passage is regarded as an interference with the riparian rights of the owner of the upland, who has the "exclusive privileges of the shore for the purpose of access to his land and the water."²⁸⁵

²⁷⁹FLA. STAT. §127.01 (1) (1959) authorizes taking for any county purpose, and §127.01 (2) lists parks, playgrounds, and recreational centers among such purposes.

²⁸⁰This requirement is spelled out in the statute. FLA. STAT. §127.01 (2) (1959).

²⁸¹*Osceola County v. Triple E Development Co.*, 90 So.2d 600 (Fla. 1956) (condemnation for a road to privately owned non-navigable lake held not for a public purpose); *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (1947) (condemnation to create a public hunting and fishing reservation in a remote area held not a public necessity).

²⁸²*Drew, J.*, concurring in *Osceola County v. Triple E. Development Co.*, *supra* note 281 at 603, says: "Had the road been condemned for the purpose of reaching a county park, playground or other public area adjacent to the shores of said lake or had land been included in the condemnation along the shores of the lake for some lawful county recreational or public purpose, then I think the County Commissioners would have been acting clearly within the scope of their power and such action would have been lawfully taken." See *Op. ATT'Y GEN.* FLA. 059-183, Sept. 11, 1959.

²⁸³*E.g.*, *LaVeine v. Stack-Gibbs Lumber Co.*, 17 Idaho 51, 104 Pac. 666 (1909); *Lorman v. Benson*, 8 Mich. 18 (1860); *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663 (1899), all cases involving use of the shore between high-water and low-water marks as an incident of floating logs. In *Garth Lumber & Shingle Co. v. Johnson*, 151 Mich. 205, 115 N.W. 52 (1908), a statute authorizing such activity without compensation was declared unconstitutional.

²⁸⁴*Stewart v. Turney*, 237 N.Y. 117, 142 N.E. 437 (1923) (hunting between high-water and low-water marks on navigable lake).

²⁸⁵*Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923) (hiker), criticized in *Waite, Public Rights to Use and Have Access to Navigable Waters*, 1958 Wis. L.

Florida, however, would seem to take a contrary position, based on the fact that riparian owners on lakes hold title only to the high-water mark.²⁸⁶ Although no cases were found involving recreational use of the land between high-water and low-water marks on lakes, the Florida Court has held that a non-riparian logger could make use of the shore between these marks for the purpose of inspecting and working on his logs as long as he did not totally exclude the riparian owner from access to the water.²⁸⁷ Moreover, a Florida circuit court has upheld the right of recreational users to free passage along ocean beaches between the high-water and low-water marks.²⁸⁸

Assuming that the same rule is applicable to lakes, will the Florida courts recognize any limitation on the right of public use of the shore? A 1942 Arkansas decision is of interest.²⁸⁹ While recognizing the right of individual members of the public to use the shore of a navigable river for beaching of fishing boats, the court refused to sanction extensive use of the riparian's banks by an adjoining commercial boating and fishing business which supplied boats for hire, on the ground that such use unreasonably interfered with the owner's right of access to his property on the river. Such an abuse of the rights incident to navigation would seem to constitute both a public and a private nuisance, against which the Florida Court might well grant injunctive relief, as it has in cases involving nuisances created by abuse of public highways.²⁹⁰

Boating

Once on a navigable lake, is a member of the public free to use it for boating? The answer is clearly "Yes." Leaving aside the point,

REV. 335, 371-74.

²⁸⁶*Martin v. Busch*, 93 Fla. 535, 574, 112 So. 274, 287 (1927). The same rule has been applied to streams. *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 So. 643 (1909). It has been linked to the fact that Florida originally belonged to Spain, under whose laws private ownership extended only to the high-water mark unless otherwise specified by express grant. See Hunt, *Riparian Rights in Florida*, 8 U. FLA. L. REV. 393 (1955).

²⁸⁷*Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, *supra* note 286.

²⁸⁸*State ex rel. Taylor v. Simberg*, 2 Fla. Supp. 178 (1952), *State ex rel. Marsh v. Simberg*, 4 Fla. Supp. 85 (1953), discussed in Hunt, *supra* note 286, at 404-06.

²⁸⁹*Anderson v. Reames*, 204 Ark. 216, 161 S.W.2d 957 (1942).

²⁹⁰*See Brown v. Florida Chautauqua Ass'n*, 59 Fla. 447, 52 So. 802 (1910)

made previously, that availability for recreational boating may itself establish navigability,²⁹¹ the Florida Court has indicated that the public has the right to use navigable lakes for recreational as well as commercial boating.²⁹² Other jurisdictions seem unanimous in finding this right in the public.²⁹³

This is not to say that the use of boats on navigable lakes cannot be regulated in the interest of public safety and welfare. Indeed, legislation providing for licensing boats, requiring minimum safety equipment, and establishing boating safety regulations, was enacted by the 1959 Florida Legislature.²⁹⁴ With more than 200,000 motorboats in use in Florida today,²⁹⁵ this legislation was long overdue. Lawless operation of motorboats creates serious hazards to bathers and other recreational users. The towing of water skiers frequently increases that hazard.

Although no adjudicated cases were found concerning the right to ski on navigable waters, this sport is so closely connected with motorboating that it seems reasonable to assume that the right to tow skiers is included in the right to boat for pleasure. As in the case of other rights, however, this practice can be abused; if it is abused it should be subject to abatement as a private nuisance if it unreasonably interferes with the use and enjoyment of their rights by riparian owners,²⁹⁶ or as a public nuisance if it creates a hazard to public safety by endangering bathers.²⁹⁷ Such an injunction was recently granted against the operators of a Florida water ski school on the theory of a public nuisance.²⁹⁸ The case is now on appeal to the Second District Court of Appeal.

Swimming, Fishing, and Hunting

In addition to boating, the public seemingly has a right to use

(granting relief on public nuisance theory); *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306 (1875) (enjoining as a private nuisance the operation of a combined jail and swine pen in the middle of public street).

²⁹¹See "American Definitions of Navigability," Pt. I *supra*.

²⁹²*Baker v. State*, 87 So.2d 497, 498 (Fla. 1956) (dictum); *Hicks v. State*, 116 Fla. 603, 156 So. 603 (1934) (by inference).

²⁹³See Annot., 57 A.L.R.2d 569, 577-79 (1958).

²⁹⁴FLA. STAT. c. 371 (1959).

²⁹⁵Florida Times-Union, Jan. 8, 1959, p. 20, col. 1.

²⁹⁶The principle involved would seem to be similar to the one justifying injunctive relief in *Anderson v. Reames*, 204 Ark. 216, 161 S.W.2d 957 (1942).

²⁹⁷See Annot., 57 A.L.R.2d 569, 594 (1958).

²⁹⁸The case was heard before Spoto, J., 13th Jud. Cir. The opinion is unre-

navigable lakes in Florida,²⁹⁹ as elsewhere,³⁰⁰ for bathing or swimming, again no doubt subject to regulation by the state in the interest of public health. This right is generally mentioned by the courts along with the right to boat and is placed on an equal footing with it.³⁰¹

Does the fact of navigability carry with it a right for members of the public to hunt and fish in and over navigable waters? The rights to hunt and to fish are often discussed together in the cases. Since no Florida cases dealing with the right to hunt were located, the right to fish will be treated first, and conclusions concerning the right to hunt on Florida's lakes will be reached by analogy to the fishing cases.

Although there are some cases holding that the right to hunt and fish on navigable waters is an incident of the right to use the waters for purposes of navigation,³⁰² the more widely accepted theory is that this right inheres in the public because the state holds title to the underlying land in trust for the public and the common right of hunting and fishing is incident to such ownership.³⁰³ Under this view the navigation right is a right of passage merely,³⁰⁴ and in those jurisdictions in which land underlying navigable waters is recognized as being in private ownership, it is the private owners, and not the public, who have the right to hunt and fish in the waters.³⁰⁵ Thus the right of the public to hunt and to fish in navigable waters is preserved in Wisconsin because title to such lakes is regarded as being in the public;³⁰⁶ but it is not available in the State of Wash-

ported. For a factual account of the controversy see Tampa Tribune, Mar. 6, 1959, p. 17D, col. 1.

²⁹⁹Baker v. State, 87 So.2d 497, 498 (Fla. 1956) (dictum).

³⁰⁰E.g., Witke v. State Conservation Comm'n, 244 Iowa 261, 56 N.W.2d 582 (1953); Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942); cf. Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926) (upholding right to wade in navigable stream).

³⁰¹E.g., Nelson v. DeLong, *supra* note 300; Baker v. State, 98 So.2d 497, 498 (dictum) (Fla. 1956).

³⁰²E.g., Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951); Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 39 N.W.2d 712 (1949); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

³⁰³State *ex rel.* Thompson v. Parker, 132 Ark. 316, 200 S.W. 1014 (1917); State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947); Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942).

³⁰⁴See 1 FARNHAM, WATERS AND WATER RIGHTS 138 (1904).

³⁰⁵See 2 *id.* at 1366. For cases recognizing a public right to fish even though the underlying land is privately owned see note 307 *infra*.

³⁰⁶Diana Shooting Club v. Husting, *supra* note 302 (hunting); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898) (fishing).

ington, which regards the public as having only an easement for navigation, so that the taking of fish would be a trespass against the riparian proprietor.³⁰⁷

The Florida Court has recognized the existence of a right in the public to fish in navigable lakes.³⁰⁸ It has not, however, indicated whether this right exists as an incident of navigation or as a separate right stemming from the trust under which the state holds title to lands under navigable lakes. Under the latter view, the right to hunt over navigable waters, since they overlie sovereignty lands held in trust for the public, would also seem to be guaranteed. Although the Florida Supreme Court has not as yet included this right in its catalogue of the rights of the public in navigable waters, it seems safe to predict that it will be included if necessary.

Needless to say, the rights both to hunt and to fish are subject to such conservation regulations as are necessary for the public welfare. In Florida the authority for regulation is specifically spelled out in the Constitution, which established the Game and Fresh Water Commission and gave it broad powers in this field.³⁰⁹

View

While the right of the public to scenic enjoyment of navigable waters has not been discussed by the Florida courts, it has been

³⁰⁷Griffith v. Holman, 23 Wash. 347, 63 Pac. 239 (1900); accord, State v. Shannon, 36 Ohio St. 423, 38 Am. Rep. 599 (1881); Winous Point Shooting Club v. Bodi, 20 Ohio C.C.R. 637 (1895). In several jurisdictions that recognize private ownership of land under navigable lakes, the right of the public to fish if lawful access to the lake can be gained is preserved. Mississippi places the right of the public to fish in such lakes on the ground that fish are *ferae naturae* and therefore are not subject to private ownership. See State Game and Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940). And Michigan differentiates between the right to hunt and trap, which is reserved to the riparian, Johnson v. Burghorn, 212 Mich. 19, 179 N.W. 225 (1920); Sterling v. Jackson, 69 Mich. 488, 37 N.W. 845 (1888), and the right to fish, which the Michigan Supreme Court regards as held in trust by the state for members of the public as long as the lake is navigable. Rushton *ex rel.* Hoffmaster v. Taggart, 306 Mich. 432, 11 N.W.2d 193 (1943); Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1927).

³⁰⁸Hicks v. State, 116 Fla. 603, 606, 156 So. 603, 604 (1934) (dictum). For a similar statement as to navigable rivers, see Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909).

³⁰⁹FLA. CONST. art. IV, §30. Implementing legislation is found in FLA. STAT. ch. 372 (1959). Fish in salt water lakes have been legislatively declared to be the property of the state and subject to its control. FLA. STAT. §370.10 (1) (1959).

recognized in at least one American jurisdiction as entitled to protection under the trust doctrine, along with boating, fishing, swimming, and hunting.³¹⁰ But recognition by the Florida courts that there may be a protectible interest in view in riparian owners on navigable waters may point the way to acknowledgement of a similar right in the public.³¹¹ Even if such a right is recognized, however, it will have to be weighed against other public interests; and unless the impairment is substantial it will probably not be looked upon as a sufficiently serious violation of the trust to warrant judicial intervention.³¹²

RIGHTS OF COMMERCIAL USERS

Non-consumptive Uses

Non-consumptive commercial uses of Florida's navigable lakes fall into two categories: commercial navigation, including the renting of pleasure boats; and commercial fishing and hunting, which are consumptive of one type of natural resource, fish and game, but non-consumptive in the sense that neither the water nor the bed of the lake is consumed.

In so far as commercial boating is concerned, Florida is in accord with other jurisdictions in that a riparian owner on a navigable lake not only has a right of access himself but can make his means of access available to the public on a commercial basis if he wishes.³¹³ Moreover, the state may lease public land to an individual for the purpose of providing boat landings and bathhouses for use by the public.³¹⁴

Of course, if the members of the public using this means of access so conduct themselves as to constitute a nuisance, for example, through unreasonable operation of boats³¹⁵ or through creating haz-

³¹⁰State v. Public Serv. Comm'n, 275 Wis. 112, 81 N.W.2d 71 (1957); Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952).

³¹¹See subheading "View" under "Rights of Riparian Owners," Pt. II *supra*.

³¹²State v. Public Serv. Comm'n, *supra* note 310; cf. Tampa So. R.R. v. Nettles, 82 Fla. 2, 89 So. 223 (1921); Duval Engr. and Contracting Co. v. Sales, 77 So.2d 431 (Fla. 1954).

³¹³Anderson v. Reames, 204 Ark. 216, 161 S.W.2d 957 (1942); Evans v. Dugan, 205 La. 398, 17 So.2d 562 (1944); Masonite Corp. v. Steede, 198 Miss. 530, 23 So.2d 756 (1945).

³¹⁴Hicks *ex rel.* Landis v. State, 116 Fla. 603, 156 So. 603 (1934).

³¹⁵Anderson v. Reames, *supra* note 313; see Forest Land Co. v. Black, *infra* note 317 at 263, 57 S.E.2d at 426, suggesting that unreasonable operation of a

ards to others by uncontrolled water-skiing,³¹⁶ the nuisance could be controlled by the riparian owners through the remedy of injunctive relief.³¹⁷

In addition, there is the possibility of control through riparian zoning, particularly if the lake lies wholly or partially within municipal limits.³¹⁸ Such zoning has been held constitutional in the face of attacks on the ground that it deprives riparians who wish to use their land for commercial purposes of their property without due process of law.³¹⁹ It does hold a danger of possible abuse if the zoning is used to prevent all access by non-riparians to a navigable lake, but in this case it might well be struck down as arbitrary and unreasonable in relation to the general welfare of the public.³²⁰

Commercial fishing is of two types: fishing on a small scale and by traditional means, including poles, hand lines, and small nets; and fishing on a large scale with a view to commercial sale of the fish. In jurisdictions following the trust theory and recognizing public ownership of the bottoms of navigable lakes both riparian owners and members of the public apparently have the right to engage in commercial fishing of both sorts,³²¹ as long as it is not done in such a way as to prevent similar fishing by others and thus establish an exclusive use by one individual.³²² This role would seem to be applicable in Florida, since it has adopted the trust approach.

motorboat would be enjoined as a nuisance.

³¹⁶See note 298 *supra*.

³¹⁷It must be remembered that there is considerable judicial reluctance to use the rather stringent remedy of injunction, at least to abate totally uses that, if controlled, may not be legally objectionable. See *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950). See also a recent unreported Florida case discussed in *Tampa Tribune*, Mar. 6, 1959, p. 17D, col. 1. But controlling the use by this means will give riparian owners all the relief to which they are legally entitled, consistent with the rights of the public to enjoy navigable lakes for recreational purposes.

³¹⁸See Comment, *Role of Local Government in Water Law*, 1959 Wis. L. Rev. 117, 135-41.

³¹⁹*Dennis v. Village of Tonka Bay*, 64 F. Supp. 214 (D. Minn. 1946), *aff'd*, 156 F.2d 672 (8th Cir. 1946); *Poneleit v. Dudas*, 141 Conn. 413, 106 A.2d 479 (1954); *Wicen v. Oconomowac Fishermen's League*, Cir. Ct. Waukesha County, Wis., No. 9142 (1958), currently on appeal to Wis. Sup. Ct.

³²⁰*State ex rel. Helseth v. DuBose*, 99 Fla. 812, 128 So. 4 (1930); *BARTLEY and BOYER, MUNICIPAL ZONING* 25-26 (1950) (U. of Fla. Studies in Pub. Adm'n No. 6).

³²¹*Anderson v. Reames*, 204 Ark. 216, 161 S.W.2d 957 (1942); *Small v. Wallace*, 124 Me. 365, 129 Atl. 444 (1925).

³²²*Johnson v. Jeldness*, 85 Ore. 657, 167 Pac. 798 (1917); see *Eagle Cliff Fishing Co. v. McGowan*, 70 Ore. 1, 137 Pac. 766, *dismissed without opinion*, 248 U.S. 589

Statutory provisions for licensing commercial fishing in Florida's lakes are consonant with this theory.³²³

In jurisdictions in which riparian owners hold title to the bottoms of navigable lakes, on the other hand, while a riparian owner may not be able to object to small scale fishing as in incident to the easement of navigation, even when done commercially,³²⁴ he may be entitled to enjoin large scale commercial fishing operations over his bottom lands as a violation of his property rights.³²⁵ Arguably a riparian owner who holds title to part of the bed of a navigable lake by virtue of a Spanish grant should have similar power to prevent large scale commercial fishing over his land.

Consumptive Uses

Consumptive commercial uses with respect to navigable lakes fall into two categories: consumptive use of the water, and uses that are consumptive of mineral deposits underlying the lake or of substances on the bed, such as sponges, crustaceans, or even cypress trees.

The legal doctrines governing consumptive use of water by riparians are discussed in detail in the section dealing with rights of riparian owners.³²⁶ The right of the state to authorize withdrawals of water from lakes for consumptive uses is likewise dealt with in the section concerning lake levels.³²⁷

Turning to the second type of consumptive use, can the state, consistent with the trust doctrine under which it holds title to the bottoms of navigable lakes in trust for the people, authorize the taking of minerals or other substances from the bottoms of Florida's navigable lakes? The Supreme Court of Florida has avoided the logical cul-de-sac into which the Supreme Court of Minnesota has fallen. That court in a 1914 case,³²⁸ while denying a riparian owner the right to take minerals from the bed of a navigable lake in front of his uplands, at the same time denied the right of the state to recover

(1914).

³²³FLA. STAT. §§372.63-.64 (fresh water licenses), §370.06 (salt water licenses) (1959).

³²⁴State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 542, 193 So. 9, 11 (1940) (dictum).

³²⁵Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953); State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940).

³²⁶See pp. [55-60] *supra*.

³²⁷See pp. [52-55] *supra*.

³²⁸State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914).

the value of minerals already taken. The decision was taken to mean that the state, because it held the title to the bed in trust, could not take or authorize the taking of minerals without violating the trust.³²⁹ The final result has been a recent restrictive redefinition of navigability in terms of actual use for commerce at the time the state entered the union.³³⁰ This redefinition will make the bottoms of many Minnesota lakes available for mining by riparians, but at the expense of depriving the public of rights of navigation previously recognized under a more liberal definition of navigability that included boating for recreational purposes.³³¹

The Florida Court very early interpreted its trust doctrine as denying a riparian the ownership of minerals in a navigable river bottom adjacent to his uplands,³³² but as permitting the state as owner to authorize the taking of the minerals as long as mining operations did not interfere with public rights incident to navigation.³³³ In other words, as long as the state sees to the protection of the public rights of "passage and navigation and fishing,"³³⁴ the residuary rights of the state to develop minerals and other products of the bed can be utilized to raise revenue for the purposes of government. The logic of these early Florida cases has been approved and adopted in other "trust theory" states.³³⁵ Applying this doctrine,

³²⁹See Fraser, *Title to the Soil Under Public Waters—The Trust Theory*, 2 MINN. L. REV. 429, 446 (1918). For additional criticism of the *Korner* case see Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313 (1918). But see Schaller v. Town of Florence, 193 Minn. 604, 613, 259 N.W. 529, 534 (1935) (dictum).

³³⁰State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1958).

³³¹Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893). For many years this decision was cited in other jurisdictions as the leading case protecting public rights through a liberal definition of navigability. See, e.g., Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158 (1936).

³³²State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893). The Court held that the Riparian Act of 1856 did not give a riparian owner the right to take phosphates from the bed of a navigable stream, since the act transferred title to such land only when it was filled and improved out to the point of practicable navigability.

³³³State v. Black River Phosphate Co., *supra* note 332; State v. Board of Phosphate Comm'rs, 31 Fla. 558, 12 So. 913 (1893).

³³⁴State v. Black River Phosphate Co., 32 Fla. 82, 92, 13 So. 640, 643 (1893); Trustees of Internal Improv. Fund v. Coastal Petroleum Co. (No. A-359, 1st D.C.A. Fla., Jan. 19, 1960) (dictum).

³³⁵E.g., Boone v. Kingsbury, 206 Cal. 148, 273 Pac. 797 (1928); Desert Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946); Campbell Brown and Co. v. Elkins, 131 W. Va. 801, 93 S.E.2d 248 (1956).

the Florida legislature has authorized the sale by the Trustees of the Internal Improvement Fund of minerals and timber under navigable waters of the state,³³⁶ as well as the sale or leasing of the right to drill for petroleum and natural gas.³³⁷ The right of the state to execute such leases was confirmed by the courts in the 1945 case of *Watson v. Holland*,³³⁸ in which the Florida Court distinguished between disposing of navigable water bottoms, which would violate the trust, and "the leasing and disposition of substances which it [the legislature] hoped might be derived from such water bottoms for the benefit of all the people of this State."³³⁹

In the exercise of this same power the legislature has authorized the State Board of Conservation to lease navigable salt water bottoms for the purpose of growing oysters or clams.³⁴⁰ Such leases are likewise presumably not in violation of the state's trust so long as navigability is not interfered with.

To date no cases involving the sale or leasing of mineral rights in the beds of navigable lakes have been decided, but since the legislation authorizing disposition by the state is sufficiently broad to include these rights,³⁴¹ there is no reason to doubt its validity in relation to such lakes.

PART III. RIGHTS ATTRIBUTABLE TO NON-NAVIGABLE LAKES

A determination that a lake is non-navigable generally excludes the public from the use of the lake.³⁴² If the bed of a non-navigable

³³⁶FLA. STAT. §253.45 (1959); OP. ATT'Y GEN. FLA. 042-138, p. 361 (1941-42).

³³⁷FLA. STAT. §253.47 (1959).

³³⁸155 Fla. 342, 20 So.2d 388 (1945); *accord*, Trustees of Internal Improv. Fund v. Coastal Petroleum Co., *supra* note 334 (construing lease as including mineral rights).

³³⁹*Id.* at 350, 20 So.2d at 393.

³⁴⁰FLA. STAT. §370.16 (1959).

³⁴¹FLA. STAT. §253.45 (1959) includes all state owned lands other than hard-surfaced beaches and contiguous areas to a mean low water depth of three feet; and §253.47, providing for petroleum leases, specifically includes the bottoms of state owned lakes.

³⁴²*Compare* Baker v. State, 87 So.2d 497 (Fla. 1956) (member of public claimed right to boat and fish; the issue was whether the part of Lake Iamonia involved was in fact navigable), *with* Triple E. Devel. Co. v. Osceola County, 6 Fla. Supp. 49 (1954), *aff'd*, 90 So.2d 600 (Fla. 1956) (county attempted to build public roads to two 500-acre lakes but made fatal concession that the lakes were non-navigable). See also Feig v. Graves, 100 So.2d 192 (2d D.C.A. Fla. 1958) (in absence of any evidence in the record the court would treat the lake as non-navigable).

lake is entirely owned by one individual, he apparently can use the lake as he would any other piece of realty, including filling it in and building on it. This is true even though there may be others who own land abutting on the lake; the concept of riparian rights accruing to an individual by virtue of his ownership of land abutting on a navigable lake has no applicability to the non-navigable lake.

When two or more individuals own portions of the bed of a non-navigable lake, the courts have not agreed on whether each owner can make reasonable use of the entire lake, or whether each is confined to his own portion. The so-called common law rule permits an owner to exclude others entirely from his part of the bed and the waters over it.³⁴³ The civil law rule, on the other hand, permits each owner to make reasonable use of the entire lake and denies any owner the right to fill or fence or to otherwise exclude his neighbors.³⁴⁴ As to the Florida position, the very recent case of *Duval v. Thomas*³⁴⁵ has now aligned the state with those jurisdictions holding that an owner of a portion of the bed of a non-navigable lake cannot restrict or curtail reasonable enjoyment of the overlying waters by the other owners of the bed. In so doing the Court recognized the importance of the state's water resources to its continued development and growth and the necessity for insuring a maximization of beneficial use. The decision, by rejecting the narrow doctrines of the old common law and adopting a rule of reasonable use, extends to non-consumptive uses of non-navigable lakes the reasonable use concept already applied to consumptive uses of water in non-navigable lakes³⁴⁶ — and probably in navigable lakes as well³⁴⁷ — and to withdrawals of

³⁴³See, e.g., *Baker v. Normanoch Assoc., Inc.*, 25 N.J. 407, 136 A.2d 645 (1957); *Akron Canal and Hydraulic Co. v. Fontaine*, 72 Ohio App. 73, 50 N.E.2d 897 (1943); *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Civ. App. 1935).

³⁴⁴*Tobias v. Tobias*, 345 Mich. 263, 75 N.W.2d 802 (1956); *Beach v. Hanyer*, 207 Mich. 93, 173 N.W. 487 (1919); *Improved Realty Corp. v. Sowers*, 195 Va. 317, 78 S.E.2d 588 (1953); *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956). For a complete collection of cases see Note, 5 U. FLA. L. REV. 166, 176-77 (1952).

³⁴⁵114 So.2d 791 (Fla. 1959), *affirming* 107 So.2d 148 (2d D.C.A. Fla. 1958). This holding was cited with approval and the Florida Court's view adopted in the recent case of *Johnson v. Seifert*, 100 N.W.2d 689 (Minn. 1960), wherein the common law rule as applied in *Lamprey v. Danz*, 86 Minn. 317, 90 N.W. 578 (1902), was expressly overruled.

³⁴⁶*Taylor v. Tampa Coal Co.*, 46 So.2d 392 (Fla. 1950); see Note, 5 U. FLA. L. REV. 166 (1952).

³⁴⁷See *Tampa Waterworks v. Cline*, 37 Fla. 586, 20 So. 700 (1896), and discussion at note 251 *supra*.

ground water.³⁴⁸ It is interesting to note that both the trial court and the intermediate appellate court invoked the same rule as that eventually adopted by the Supreme Court.

The decision in *Duval v. Thomas* makes it clear that the owners of separate portions of the bed of a non-navigable lake in Florida have co-equal rights to the use of the entire lake, and the Court has indicated that this includes boating, bathing, and fishing.³⁴⁹

Can these uses be made available to members of the public who, perhaps for a fee, are invited by an owner of part of the lake to make use of all of it? There are strong indications in the case that members of the public may be given access. The Court says:³⁵⁰

"We take judicial knowledge of the importance of 'tourism' to our state. Florida is advertised as a playground, a retreat from the hurryscurry of the modern world and from the rigors of northern climes. Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here. If the enjoyment of non-navigable lakes were to be curtailed or restricted by a holding that the owner of a portion of one of them, and his guests, should enjoy the waters only within the property lines, the damage would be immeasurable."

If this is interpreted to mean that members of the public may gain access through an owner of a part of the lake, are there any limitations on the number that can be invited or on their activities? The Court answers: [W]e feel free to announce that the body of water should be available to all owners for use that would not unreasonably interfere with rights of the other proprietors."³⁵¹ When would use by the public become unreasonable? Could hundreds of people be invited to use the lake? The answer, of course, would vary with the size of the lake, but a New Jersey stream case is of interest. The New Jersey court at the request of a lower riparian owner found it unreasonable to use water from a small non-navigable stream to provide swimming in an adjacent pond for boys in groups of seventy.³⁵² A Florida circuit court has recently found the operation

³⁴⁸Koch v. Wick, 87 So.2d 47 (Fla. 1956).

³⁴⁹114 So.2d 791, 793, 795 (Fla. 1959).

³⁵⁰*Id.* at 795.

³⁵¹*Id.* at 794.

³⁵²McCord v. Big Brothers Movement, 120 N.J. Eq. 446, 185 Atl. 480 (Ch. 1936).

of a water skiing school on a non-meandered lake to be unreasonable, while indicating that skiing on a small scale would be permissible.³⁵³

To what extent can the state regulate the use of a non-navigable lake? The question has generally arisen in connection with the applicability of fish and game laws. There is no question as to the state's right to regulate fishing and hunting in or on navigable public waters.³⁵⁴ When the bed of a non-navigable lake is in private ownership, however, the common law laissez-faire philosophy of the sanctity of private property runs headlong into the state's desire to conserve its natural resources.³⁵⁵ Little difficulty has been found in establishing the state's authority to control hunting, even on privately owned lands. The fact that wild game has little respect for property lines but moves freely from one man's property to the next has led the courts to classify wild game as *ferae naturae*, and to decree that the mere presence of game on private land does not entitle the owner of the land to claim ownership of it.³⁵⁶ The owner of the real estate has the exclusive right to hunt wild game while it is upon his lands; but until he has reduced it to his possession the state's interest is superior, and the power to regulate goes with the game.³⁵⁷

The same general principles have been applied to fish, although an additional factor is involved. If a lake is entirely surrounded by land, without connection with other water bodies, passage of fish in or out of the lake will be effectively cut off. In the absence of such movement the argument for state control loses its basic premise — the necessity for regulation of a natural resource that is shared by the public. The courts have recognized the force of this argument, and in those cases in which the privately owned lake was found to be in no way connected with another body of water the state has been denied the power to regulate.³⁵⁸ Occasional or intermittent high water or flooding which permits fish to pass for short periods in or

See also *People v. Hulbert*, 131 Mich. 156, 174, 91 N.W. 211, 218 (1902).

³⁵³See note 298 *supra*.

³⁵⁴See discussion p. 31-33 *supra*.

³⁵⁵FLA. STAT. CC. 370, 372 (1959).

³⁵⁶See, e.g., *Pierson v. Post*, 3 Gaines 174 (N.Y. 1805).

³⁵⁷See *Harper v. Galloway*, 58 Fla. 255, 51 So. 226 (1909); *Hamilton v. Williams*, 145 Fla. 697, 700, 200 So. 8, 81 (1941) (dictum). See also 2 AM. JUR., *Animals* §8 (1936).

³⁵⁸E.g., *Milton v. State*, 144 Ark. 1, 221 S.W. 461 (1920); *State v. Biggs*, 12 N.J. Misc. 833, 175 Atl. 362 (Sup. Ct. 1934), *aff'd*, 117 N.J.L. 240, 187 Atl. 199 (1936); see *Newman v. Ardmore Rod & Gun Club*, 190 Okla. 470, 125 P.2d 191 (1942).

out of an otherwise landlocked lake has not been enough in the eyes of the Arkansas³⁵⁹ and Oklahoma³⁶⁰ courts to permit state intervention, although Illinois³⁶¹ and Michigan³⁶² think otherwise.

Even though the lake and the surrounding land are owned entirely by one individual, he is not relieved from state regulation so long as there is a passageway through which the fish may travel that connects with public waters.³⁶³ A fortiori, a lake with such an outlet owned by several individuals is within the reach of the state's laws.³⁶⁴

Is ownership of a non-navigable lake by two or more individuals enough in itself to warrant state control of fishing even though there may be no connection between the lake and other bodies of water? State regulation under these circumstances probably could not be predicated upon protection of the public interest in the fish. The fact that there is more than one owner entitled to the use of the lake does not open it to the general public,³⁶⁵ although it is clear in Florida that each owner is entitled to fish in the whole lake.³⁶⁶ In an 1896 Tennessee case an owner of 1,000 acres of a 1,040-acre lake was convicted of violating a state fishing law applicable to all lakes or ponds except private ponds.³⁶⁷ The court considered the water body to be outside the term *private pond* because it was not owned entirely by one individual. The court did not discuss the question of connection with other bodies of water, although there

³⁵⁹Arkansas Game & Fish Comm'n v. Storthz, 181 Ark. 1089, 29 S.W.2d 294 (1930).

³⁶⁰Washburn v. State, 90 Okla. Crim. 306, 213 P.2d 870 (1950).

³⁶¹People v. Bridges, 142 Ill. 30, 31 N.E. 115 (1892).

³⁶²People v. Horling, 137 Mich. 406, 100 N.W. 691 (1904). See also People v. Lewis, 227 Mich. 343, 198 N.W. 957 (1924).

³⁶³People v. Horling, note 362 *supra*; see People v. Doxtater, 147 N.Y. 723, 42 N.E. 724 (1894) (memorandum decision).

³⁶⁴See People v. Bridges, *supra* note 361; Reid v. Ross, 46 S.W.2d 567 (Mo. 1932); Annot., 15 A.L.R.2d 754 (1959). See also Bannon v. Logan, 66 Fla. 329, 63 So. 454 (1913), upholding a conviction of one who was found to own the portion of the bed of the meandered lake upon which he was fishing in violation of the state fishing law. Since a portion of the lake was meandered, it was presumably navigable, at least in part. Even if the petitioner's land underlay a non-navigable portion of the lake, the fact that the fish could travel from navigable waters to his portion apparently would make him susceptible to state fishing regulations.

³⁶⁵See p. 67 *supra*.

³⁶⁶Duval v. Thomas, 114 So.2d 791 (Fla. 1959). It is an open question whether such an owner could allow the public access to the entire lake.

³⁶⁷Peters v. State, 96 Tenn. 682, 36 S.W. 399 (1896).

was some evidence that the Mississippi River periodically overflowed into the lake involved.

By statute the State of Florida has declared itself the owner for the benefit of the people of all fish within the jurisdiction of the state except those enclosed in privately owned ponds not exceeding 150 acres.³⁶⁸ Since the statute is found in the chapter on salt water fisheries, its operation may well be limited to salt water lakes,³⁶⁹ but at least as to such lakes it raises several interesting possibilities. Assuming a pond or a lake smaller in size than 150 acres but connected to another water body in which the public has an interest, does the statute remove the lake from state regulation? The use in the statute of the term *enclosed* suggests a basis for limiting the exception to lakes without any connection with other bodies of water. Such a construction would be consistent with the general rule as to connected lakes. But assuming a lake in multiple ownership that is smaller than 150 acres and without an outlet of any kind, under the statute the fact of such ownership apparently would not be enough to make the lake the subject of state regulation.

The converse of the above problem — a lake exceeding 150 acres but non-navigable and without an outlet — raises additional problems. Whether attempts by the state to regulate fishing on the basis of this statute would be a taking of private property in violation of constitutional guarantees is unanswered at present. An attempt by a member of the public to claim a right to fish in such a lake, based solely on a state license plus the statutory declaration of state ownership of the fish, would probably be unsuccessful. In *Hamilton v. Williams*³⁷⁰ a hunter convicted of trespassing on privately-owned posted lands contended that his possession of a state hunting license authorized him to enter the enclosed area without permission as long as his entry was peaceable and solely for the purpose of hunting game. The Court found this contention without merit, holding that a license would in no way justify a trespass upon private lands, since this would constitute a taking of private property in violation of constitutional guarantees. The Court stated that although property in *ferae naturae* is vested in the state as trustee for all of its citizens, the owner of real estate has the exclusive right to hunt wild game

³⁶⁸FLA. STAT. §370.10 (1) (1959).

³⁶⁹See discussion of *McDowell v. Trustees of Internal Improv. Fund* at note 79 *supra*.

³⁷⁰145 Fla. 697, 200 So. 80 (1941).

while it is upon his soil, subject to lawful regulation by the state.³⁷¹

The right of an owner of all or part of a non-navigable lake to use the water for swimming has been challenged on a few occasions by enactment of regulations purporting to prohibit such use as a necessary step in preserving public water supplies. In *Pounds v. Darling*³⁷² the Florida Court declared such an ordinance invalid as applied to the owner's right to swim in the lake, since it deprived him of a property right without compensation. The Court stated that the proper method for acquiring the right to prohibit such use was by the city's exercise of its power of eminent domain.³⁷³

SUMMARY AND CONCLUSION

Navigability is often thought of as the fountainhead of public rights, particularly the rights of recreational users of Florida's rivers and lakes. The concept is sufficiently broad to make the majority of Florida's rivers available for recreational use by the public,³⁷⁴ but historical developments have created serious roadblocks in the way of recognizing and protecting similar public rights in most of her estimated 30,000 lakes.

In the original federal survey of the state, the surveyors were instructed to meander navigable water bottoms. In other states, following instructions from the General Land Office, they meandered all lakes of more than twenty-five acres in area; but in Florida, for one reason or another, no more than 190 fresh-water lakes were in fact meandered. A list of these lakes will be found in an appendix to this article.

Although failure to meander a lake is not conclusive evidence that it is non-navigable, it was early assumed by the Trustees of the Internal Improvement Fund that the non-meandered lakes of Florida were non-navigable and that they had been acquired by the state under the Swamp and Overflowed Lands Act of 1850. As a result, the bottoms of these lakes were not regarded as sovereignty lands, and over the past century most of them have been conveyed to private owners.

It has been assumed that once these lakes were conveyed by the state, public rights of use were lost. This view, however, is contrary

³⁷¹See also *Harper v. Galloway*, 58 Fla. 255, 51 So. 226 (1910).

³⁷²75 Fla. 125, 77 So. 666 (1918).

³⁷³*Accord*, *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211 (1902); *Petition of Clinton Water Dist.*, 36 Wash. 2d 284, 218 P.2d 309 (1950).

³⁷⁴*Maloney and Plager, Florida's Streams*, 10 U. FLA. L. REV. 294, 329 (1957).

to the Spanish civil law approach to public use of lakes. Under that law, which was applicable in Florida at least until 1819, the public was entitled to use lakes for boating, regardless of whether the bottom was in public or private ownership, as long as the lake was actually useful for navigation of any sort.

Any approach to public use through navigability begs the question of the meaning of that term. But public rights to access, passage along the shore, boating, swimming, fishing, hunting, and perhaps even to the enjoyment of view, may well turn on this definition. And a finding that a lake is navigable may extend the rights of navigation and passage of a riparian owner while curtailing his rights to wharf and fill and to exclude others from the shore between the high-water and low-water marks. A number of Florida lake cases point the way toward a broad definition which would include use for recreational boating. And the commercial value of tourism to the state might well influence the Court to find pleasure boating a commercial use in Florida.

But Florida has taken the position that the state holds title to the lands under navigable waters in "trust" and cannot dispose of major portions of the beds. Adoption of a liberal definition of navigability, without more, and its application to Florida's non-meandered lakes, would therefore have the effect of upsetting conveyances of long standing from the state. The recent case of *Adams v. Crews*³⁷⁵ has been criticized on this basis, and the establishment of navigability on a lake-by-lake basis by litigation of this sort will be both costly and uncertain.

There are other ways in which some of Florida's larger non-meandered lakes can legally be made available for public use. Working through the concept of navigability, Florida's courts or her legislature could differentiate between federally navigable lakes, including the meandered lakes that have traditionally been placed in this category and those that are navigable under a state though not the federal definition. The trust doctrine could continue to be applied to the former, while the state-recognized navigability of the latter could be the basis for recognition of an easement for navigation without invalidating earlier conveyances. This approach would be consistent with the civil law rule originally applicable in Florida, and it has been judicially approved in Oregon.³⁷⁶

³⁷⁵105 So.2d 584 (2d D.C.A. Fla. 1958).

³⁷⁶*Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936).

An alternative might be legislation similar to that found in Louisiana,³⁷⁷ which prohibits attacks on titles to previously conveyed lands under navigable waters. The legislation could be coupled with a broadening of the definition of navigability to encompass recreational navigation, thus extending recognition of the right of public navigation to many of Florida's non-meandered lakes. But the fact that other public recreational uses, such as bathing and fishing, might not be available unless clearly spelled out by the legislature injects a note of caution with respect to possible use of this approach.

One problem inherent in any reappraisal of the navigability of Florida's lakes is where to redraw the line if the old meander lines are not to set the boundaries of public use. Certainly it would be unrealistic and inappropriate to suggest that every pond that could float a rowboat be declared navigable and open to the public.³⁷⁸ One possible guideline might be the legislative declaration of state ownership of fish in lakes exceeding 150 acres.³⁷⁹ It has been estimated that approximately 950 of Florida's lakes exceed this size,³⁸⁰ whereas no more than 190 were meandered in the original surveys. If this size is thought inappropriate, the legislature in broadening the definition of navigability could after appropriate study declare a size below which the statutory definition would not be applicable and public rights of use would not inhere.

In addition to the above suggestions, there is the possibility that some non-navigable lakes might be made available to the public through recognition of an easement for public use when a lake has been stocked by the state and open to the public for a period of years. Florida has now adopted the civil law rule permitting owners of a part of a non-navigable lake to use the entire lake.³⁸¹ Members of the public may be able to gain access by invitation of an owner of part of the lake. Finally, it may be practicable through the granting of special tax benefits to encourage riparians to permit use of their lands for public access to more of Florida's lakes.

³⁷⁷LA. REV. STAT. §9:5661 (1951), discussed in text following note 74 *supra*.

³⁷⁸The Wisconsin approach is apparently almost this extreme. See *Shepard Drainage Dist. v. Emmerman*, 140 Wis. 327, 122 N.W. 755 (1908), declaring a millpond to be navigable and open to the public.

³⁷⁹FLA. STAT. §370.10 (1) (1950), found in the chapter on salt water fisheries and discussed in Part III *supra*.

³⁸⁰Interview with Ney C. Landrum of W. Turner Wallace and Associates, Water Resources Consultants, at the Governor's Fresh Water Lakes Conference, Tallahassee, Fla., Mar. 16, 1960.

³⁸¹*Duval v. Thomas*, 114 So.2d 791 (Fla. 1959).

At this moment it is not certain which, if any, of these suggestions for protecting the public interest may prove feasible. But one thing does seem certain. With the increasing pressure to develop and conserve more of Florida's fresh-water lakes for public use, steps will be taken to bring about a more equitable harmonizing of the public interest with the property rights of private owners. And, as pointed out by Florida's Governor at a recent fresh-water lakes conference, "moderate improvements in policy and administration now will forestall the necessity for more drastic programs of government control later."

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APPENDIX
MEANDERED FLORIDA LAKES

<i>Lake</i>	<i>County</i>	<i>Township</i>	<i>Range</i>
A Deep Pond	Madison	3 N	8 E
Adaho	Putnam	9 S	23 E
Adelaide	Highlands	33 S	28 E
Allie (Little Red Water)	Highlands	36 S	29 E
Alligator	Osceola	26 S	31 E
Alligator Pond (Lake Towell)	Bradford	6, 7 S	21 E
Altio	Alachua	8 S	21, 22 E
Ammonia	Calhoun	2 S	8 W
Angelo	Highlands	33 S	28, 29 E
Annie	Highlands	38 S	20 E
Annie	Polk	29 S	27 E
Apopka	Lake, Orange	21, 22 S	26, 27, 28 E
Apthorp	Highlands	36 S	29, 30 E
Arbuckle	Polk	36 S	29, 30 E
Ariana	Polk	27, 28 S	25 E
Ashby	Volusia	18 S	22 E
Ashley	Putnam	9 S	23 E
Banana (Mud)	Polk	29 S	24 E
Bear (Carrie)	Highlands	36 S	29 E
Beauclaire	Lake, Orange	20 S	26, 27 E
Beresford	Volusia	17 S	29, 30 E
Belmon (Clinch, Crooked, Locha-popka or Turtle Eating)	Polk	31, 32 S	27, 28 E
Bess	Polk	29 S	27 E
Bethel	Volusia		
Blue	Highlands	36 S	30 E
Blue	Polk	30 S	27 E
Bonny (Bony)	Polk	28 S	24 E
Bourke (Eagle)	Polk	28, 29 S	25, 26 E
Boyd's	Putnam	9 S	24 E
Bradley	Citrus	20 S	20 E
Brantley	Putnam	9 S	23, 24 E
Broward	Putnam	11 S	27 E
Bryant	Marion	15, 16 S	24, 25 E
Buck	Highlands	35 S	29 E
Buffum	Polk	31 S	26, 27 E
Butler	Orange	23, 24 S	27, 28 E
Butler (Tarpon)	Pinellas	27, 28 S	16 E
Caloosa (Crooked)	Polk	30, 31 S	27, 28 E
Cannon	Polk	28 S	26 E
Carlton (Sam's)	Orange	20 S	26, 27 E
Carrie (Bear)	Highlands	36 S	29 E
Center Lake Nellie	Highlands	36 S	29 E
Childs (Placid)	Highlands	37 S	29, 30 S
Chipola (Dead)	Calhoun, Gulf	3, 4 S	9, 10 W
Clarke	Palm Beach	44 S	43 E
Clay	Highlands	36 S	30 E
Clearwater	Putnam	9 S	23, 24 E
Clinch (Belmon, Crooked, Locha-popka, Turtle Eating)	Polk	31, 32 S	27, 28 E
Conine	Polk	28 S	26 E

APPENDIX (Continued)

MEANDERED FLORIDA LAKES

<i>Lake</i>	<i>County</i>	<i>Township</i>	<i>Range</i>
Conway	Orange	23 S	29, 30 E
Cowpens (Water Pen)	Putnam	10 S	23 E
Cram	Highlands	36 S	30 E
Crescent (Dunn's)	Flagler, Putnam	11, 12, 13 S	27, 28 E
Crews	Highlands	26, 27 S	29 E
Crooked (Caloosa)	Polk	30, 31 S	27, 28 E
Crooked (Belmon, Clinch, Locha-popka, Turtle Eating)	Polk	31, 32 S	27, 28 E
Crosby (Little Lake Sampson)	Bradford	6 S	21 E
Crystal (part of Hamilton)	Polk	28 S	26, 27 E
Cypress (Ocheese Pond)	Baker	3 S	19 E
Cypress (Hatchineha)	Osceola	28 S	28, 29 E
Damon	Highlands	33 S	28 E
Dead	Flagler	12, 13 S	28 E
Dead Lakes (Chipola)	Calhoun, Gulf	3, 4 S	9, 10 W
Deer	Walton	3 S	18 W
Dexter (also Pond)	Lake, Volusia	16 S	27, 28 E
Dinner	Highlands	34 S	29 E
Disston	Flagler	14 S	29 E
Distress (Keystone)	Hillsborough	27 S	17 E
Doctors	Clay	4 S	25, 26 E
Dora	Lake	19, 20 S	26, 27 E
Dorr	Lake	17 S	27 S
Dunn's (Crescent)	Flagler, Putnam	11, 12, 13 S	27, 28 E
Eagle (Bourke)	Polk	28, 29 S	25, 26 E
East Lake Tohopekaliga	Osceola	25, 26 S	30, 31 E
Eastern	Walton	3 S	18 W
Easy	Polk	30 S	27, 28 E
Eloise	Polk	28, 29 S	26 E
Eustis	Lake	9 S	26 E
Fanny	Polk	28 S	26 E
Flints, Lake of (Thonotosassa)	Hillsborough	28 S	20 E
Francis (Jack)	Highlands	36 S	29 E
Garfield	Polk	29, 30 S	26 E
Gator	Polk	30 S	26 E
Geneva (No. XI)	Clay	8 S	23 E
Gentry	Osceola	27 S	30, 31 E
George	Lake, Volusia	13, 41 S	26, 27 E
George's	Putnam	8 S	24 E
Gertrude	Lake	19 S	26, 27 E
Gibson	Polk	27 S	23, 24 E
Goose	Putnam	9 S	24 E
Gordon	Polk	30 S	27 E
Grandin	Putnam	9 S	24 E
Grassy	Highlands	37 S	30 E
Grassy	Lake	22 S	26 E
Griffin	Lake	18, 19 S	24, 25 E
Hamilton (now comprises Crystal, Sarah, Middle & Little Hamilton)	Polk	28 S	26, 27 E

APPENDIX (Continued)

MEANDERED FLORIDA LAKES

<i>Lake</i>	<i>County</i>	<i>Township</i>	<i>Range</i>
Hampton (Little Santa Fe, Santa Fe Pond)	Bradford	7 S	21 E
Hancock	Polk	28, 29 S	24, 25 E
Harney	Volusia, Seminole	20 S	32, 33 E
Harris	Lake	19, 20 S	24, 25 E
Hart	Orange	24 S	31 E
Hartridge	Polk	38 S	26 E
Hatchineha (Cypress)	Osceola	28 S	28, 29 E
Head of Deadman's (Reedy, Istopogayksa)	Polk	31, 32 S	28 E
Henry	Highlands	36 S	30 E
Hill	Highlands	36 S	29 E
Hollingsworth	Polk	28 S	24 E
Howard	Polk	28 S	26 E
Huntley	Highlands	36, 37 S	26 E
Iamonia	Leon	3 N	1 E, 1 W
Istokpoga	Highlands	35, 36 S	30, 31 E
Istokpokayksa (Head of Deadman's, Reedy)	Polk	31, 32 S	28 E
Jack (Francis)	Highlands	36 S	29 E
Jackson	Leon	1, 2 N	1 W
Jackson (Rex Beach)	Highlands	34 S	28 E
Jackson	Osceola	29, 30 S	31, 32 E
Jackson (Jackson's Pond)	Walton	6 N	21 W
Jessup	Seminole	20 S	30, 31 E
Joanna	Lake	19 S	27 E
John's Lake	Lake, Orange	22 S	26, 27 E
Josephine	Highlands	35 S	29 E
June-in-Winter (Stearns)	Highlands	36, 38 S	29, 30 E
Juanita	Lake	19 S	26 E
Kerr (Ker)	Marion	13 S	25, 26 E
Keystone (Distress)	Hillsborough	27 S	17 E
Kissimmee	Osceola, Polk	29, 30, 31 S	30, 31 E
Kotsa (Tiger)	Polk	29, 30 S	29, 30 E
Ledwith	Alachua, Marion	11, 12 S	19, 20 E
Lee	Polk	29 S	27 E
Lelia	Highlands	33 S	28 E
Lenore	Polk	31 S	28 E
Letta	Highlands	33, 34 S	28 E
Levy	Alachua	11 S	19, 20 E
Levy's Prairie	Putnam	10 S	23 E
Little Lake Hamilton (part of Hamilton)	Polk	28 S	27, 28 E
Little Lake Harris	Lake	20, 21 S	25, 26 E
Little Lake Sampson (Little Sampson Pond, Rosby)	Bradford	6 S	21 E
Little Santa Fe (Hampton, Santa Fe Pond)	Bradford	7 S	21 E
Little Santa Fe	Alachua	8, 9 S	22 E
Little Red Water (Allie)	Highlands	36 S	29 E
Livingston	Polk	32 S	28 E

APPENDIX (Continued)

MEANDERED FLORIDA LAKES

<i>Lake</i>	<i>County</i>	<i>Township</i>	<i>Range</i>
Lizzie	Osceola	26 S	31 E
Locha-popka (Belmon, Clinch, Crooked, Turtle Eating)	Polk	31, 32 S	27, 28 E
Lochloosa (Lockloosa)	Alachua	11 S	21, 22 E
Long	Putnam	9 S	24 E
Long Pond	Volusia	13 S	28 E
Lotela	Highlands	33 S	28 E
Louisa (Louise)	Lake	23 S	26 E
Louise (Louisa)	Lake	23 S	26 E
Lulu (part of Eloise)	Polk	28, 29 S	26 E
Mangonia	Palm Beach	43 S	43 E
Marian	Polk	27, 28 S	25 E
Marion	Osceola	30 S	32, 33 E
Marion	Polk	27, 28 S	27, 28 E
McCoy	Highlands	37 S	30 E
McLeon	Polk	19 S	25, 26 E
Miccousukee	Jefferson, Leon	2, 3 N	3. 4 E
Middle Hamilton (part of Hamilton)	Polk	28 S	26, 27 E
Mills (Mill)	Putnam	21 S	32 E
Minehaha	Lake	22, 23 S	25, 26 E
Minneola	Lake	22 S	25, 26 E
Monroe	Seminole, Volusia	19 S	30, 31 E
Moody	Polk	31 S	28 E
Mud (Banana)	Polk	28 S	24 E
Mud (Spring Garden)	Volusia	16 S	29 E
Myrtle	Polk	29 S	27 E
Nellie	Highlands	36 S	29 E
Newnan's	Alachua	9, 10 S	21 E
Norris	Lake	18 S	28 E
N. W. Nellie	Highlands	36 S	29 E
No. XI (Geneva)	Clay	8 S	23 E
Ocean	Baker	3 S	19 E
Ocheese (Cypress)	Jackson	3, 4 N	7, 8 W
Okeechobee	Glades, Palm Beach	37-43 S	32-37 E
Ola	Orange	20 S	27 E
Orange	Alachua, Marion, Putnam	11, 12 S	21, 22 E
Orange Grove	Putnam	9 S	24 E
Osborne	Palm Beach	44, 45 S	43 E
Oyster	Walton	3 S	20 W
Panasoffkee	Sumter	19, 20 S	22 E
Parker	Polk	27, 28 S	24 E
Pearl	Highlands	27 S	30 E
Persimmon	Highlands	36 S	29 E
Persimmon	Highlands	37 S	28 E
Pickett (Pickle)	Orange, Volusia	22 S	32 E
Pickle (Pickett)	Orange, Volusia	22 S	32 E
Pierce	Polk	28, 29 S	23 E
Placid (Childs)	Highlands	27 S	29, 30 E
Poinsett	Orange, Brevard, Osceola	24, 25 S	34 E

APPENDIX (Continued)

MEANDERED FLORIDA LAKES

<i>Lake</i>	<i>County</i>	<i>Township</i>	<i>Range</i>
Polecat	Polk	30 S	26 E
Powell	Bay	2 S	17 W
Preston	Osceola	25 S	32 E
Pythias	Highlands	33 S	28 E
Rachella	Polk	28 S	26 E
Red Beach	Highlands	35 S	29 E
Red Water	Highlands	36 S	29 E
Reedy (Istokpogayolsa, Head of Deadman's)	Polk	31, 32 S	28 E
Rex Beach	Highlands	34 S	28, 29 E
Rosalie	Polk	28 S	26 E
Rowell (Alligator Pond)	Bradford	6 & 7 S	21 E
Ruby	Polk	29 S	26, 27 E
Runnymede	Osceola	26 S	30, 31 E
Ruth	Highlands	35 S	29 E
Saddlebags	Highlands	26, 27 S	30 E
Sampson (Sampson Pond)	Bradford	6, 7 S	21 E
Sam's Lake (Carlton)	Orange	20 S	26, 27 E
Santa Fe	Alachua	8, 9 S	22 E
Santa Fe Pond (Hampton, Little Santa Fe)	Bradford	7 S	21 E
Sarah (part of Hamilton)	Polk	28 S	27, 28 E
Sarah Jane	Sumter	18 S	23 E
Saunders	Lake	19 S	26 E
Scott	Polk	29 S	24 E
Sebring	Highlands	34 S	28 E
Shipp	Polk	28 S	26 E
Silver	Lake	19 S	25 E
Simmons	Highlands	26 S	29 E
Sirena	Highlands	37 S	27 E
Smart	Polk	28 S	26 E
Smith (name uncertain)	Marion	16 S	23 E
S. E. Nellie	Highlands	36 S	29 E
Spring Garden (Mud)	Volusia	16 S	29 E
Stalworth	Walton	3 S	20 W
Stearns (June-in-Winter)	Highlands	36, 37 S	29, 30 E
Stella	Putnam	12 S	27, 28 E
Streety	Polk	32 S	27 E
Suggs	Putnam	9 S	23 E
Surveyors	Polk	30 S	26 E
Swan	Putnam	9 S	23 E
Tsala Apopka	Citrus	18, 19, 20 S	20 E
Tarpon (Butler)	Pinellas	27, 28 S	16 E
Thonotosassa (Lake of Flints)	Hillsborough	28 S	20 E
Tiber Butler	Orange	23 S	28 E
Tiger (Kotsa)	Polk	29, 30 S	29, 30 E
Tohopekaliga	Osceola	25, 26, 27 S	29, 30 E
Tracy	Lake	17, 18 S	28 E
Trout	Osceola	26 S	31, 32 E
Trout	Polk	32 S	28 E
Tulane	Highlands	33 S	28 E
Turtle Eating (Belmon, Clinch, Locha-popka, Crooked)	Polk	31, 32 S	27, 28 E

APPENDIX (Continued)

MEANDERED FLORIDA LAKES*

<i>Lake</i>	<i>County</i>	<i>Township</i>	<i>Range</i>
Vigo	Highlands	33 S	28 E
Wales	Polk	20 S	27, 28 E
Walk-in-the Water (We-oh-kapka)	Polk	31, 32 S	29 E
Wall	Putnam	9 S	23 E
Washington	Brevard	26, 27 S	35 E
Webster	Palm Beach	45 S	43 E
We-ho-ya-kapka (Walk-in-the-Water)	Polk	31, 32 S	29 E
Weir	Marion	17 S	23, 24 E
Wimico	Gulf	7 & 8 S	9 W
Winder	Brevard	25, 26 S	35 E
Winterset	Polk	29 S	26 E
Yale	Lake	18 S	25, 26 E
UNNAMED LAKES			
1 in Secs. 13, 24	Lake	18, 29 S	26, 27 E
1 in Secs. 24, 25	Lake	19 S	26 E
and Secs. 18, 19	Lake	18 S	27 E
1 in Sec. 27	Putnam	9 S	24 E
3 in Sec. 21	Putnam	9 S	24 E
1 in Sec. 16 (5 meandered as 1 lake)	Putnam	9 S	24 E
1 in Secs. 20, 29	Volusia	15 S	30 E
1 in Secs. 28, 29, 30, 31, 32, 33	Volusia	15 S	30 E
1 in Sec. 19, 20	Volusia	15 S	30 E
and Sec. 24	Volusia	15 S	29 E

*This alphabetical list of meandered Florida lakes was made available to the authors through the courtesy of the office of the Trustees of the Internal Improvement Fund.